DOCKET

SUPREME COURT OF THE UNITED STATES

No. 13-628

Title: Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky, Petitioner
v.
John Kerry, Secretary of State

Docketed: November 22, 2013

Linked with 13A354

Lower Ct: United States Court of Appeals for the District of Columbia Circuit

Case Nos.: (07-5347)

Decision Date: July 23, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 8 2013	Application (13A354) to extend the time to file a petition for a writ of certiorari from October 21, 2013 to November 20, 2013, submitted to The Chief Justice.
Oct 8 2013	Application (13A354) granted by The Chief Justice extending the time to file until November 20, 2013.
Nov 20 2013	Petition for a writ of certiorari filed. (Response due December 23, 2013)
Dec 18 2013	Order extending time to file response to petition to and including January 22, 2014.
Dec 23 2013	Brief amici curiae of Members of the United States Senate, and United States House of Representatives filed.
Jan 14 2014	Order further extending time to file response to petition to and including February 21, 2014.
Feb 21 2014	Brief of respondent John Kerry, Secretary of State in opposition filed.
Mar 3 2014	Reply of petitioner Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky filed.
Mar 12 2014	DISTRIBUTED for Conference of March 28, 2014.
Mar 31 2014	DISTRIBUTED for Conference of April 4, 2014.
Apr 7 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 21 2014	Petition GRANTED.
May 8 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 15, 2014.
May 8 2014	The time to file respondent's brief on the merits is extended to and including September 22, 2014.
Jul 15 2014	Joint appendix filed. (Statement of costs filed)
Jul 15 2014	Brief of petitioner Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky filed.

Jul 17 2014	Brief amicus curiae of Louis Fisher filed.
Jul 22 2014	Brief amicus curiae of American Jewish Committee filed.
Jul 22 2014	Brief amici curiae of Anti-Defamation League, et al. filed.
Jul 22 2014	Brief amicus curiae of Endowment for Middle East Truth (EMET) filed.
Jul 22 2014	Brief amici curiae of Members of the United States House of Representatives filed.
Jul 22 2014	Brief amicus curiae of Texas filed.
Jul 22 2014	Brief amici curiae of Louis D. Brandeis Center for Human Rights Under Law, et al. filed.
Jul 22 2014	Brief amicus curiae of Zionist Organization of America filed.
Jul 22 2014	Brief amicus curiae of Public Citizen, Inc. filed.
Jul 22 2014	Brief amicus curiae of International Association of Jewish Lawyers and Jurists (R.A.) filed.
Jul 22 2014	Brief amicus curiae of The United States Senate filed.
Sep 4 2014	SET FOR ARGUMENT on Monday, November 3, 2014.
Sep 8 2014	Record requested from U.S.C.A. for the District of Columbia Circuit.
Sep 9 2014	Record received from U.S.D.C. of District of Columbia is electronic and located on PACER.
Sep 16 2014	Record received from U.S.C.A District of Columbia Circuit is located on PACER. Also record received from U.S.C.A. District of Columbia Circuit. 1-Box
Sep 19 2014	CIRCULATED
Sep 22 2014	Brief of respondent John Kerry, Secretary of State filed. (Distributed)
Sep 29 2014	Brief amicus curiae of The American-Arab Anti-Discrimination Committee filed. (Distributed)
Sep 29 2014	Brief amicus curiae of True Torah Jews, Inc. filed. (Distributed)
Sep 29 2014	Brief amicus curiae of David Boyle filed. (Distributed)
Oct 22 2014	Reply of petitioner Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky filed.
Nov 3 2014	Argued. For petitioner: Alyza D. Lewin, Washington, D. C. For respondent: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

13-628

No. 13-_____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

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The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a – 63a, *infra*) is reported at *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013). Earlier opinions of the Court of Appeals are reported at 571 F.3d 1227 (D.C. Cir. 2009), *rehearing en banc denied*, 610 F.3d 84 (D.C. Cir. 2010), and 444 F.3d 614 (D.C. Cir. 2006). The District Court's two opinions are reported at 511 F. Supp. 2d 97 (D.D.C. 2007), and electronically at 2004 WL 5835212 (D.D.C. Sept. 7, 2004).

JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its opinion on July 23, 2013. On October 8, 2013, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 20, 2013 (Pet. App. B, p. 64a, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 214(d) of Public Law No. 107-228 provides as follows:

> **SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL**
>
> * * *
>
> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. For purposes of the registration of birth,

> certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

The relevant provisions of the Foreign Affairs Manual ("FAM"), 7 FAM 1380-1383, appear at Pet. App. C, pp. 65a-68a, *infra*.

STATEMENT

This is an action brought by parents of petitioner, an American citizen born in Jerusalem, seeking enforcement of a statutory provision enacted in 2002 directing the Secretary of State, on request, to endorse U.S. passports and Consular Reports of Birth Abroad of American citizens born in Jerusalem with "Israel" as the place of birth. The Court of Appeals initially affirmed the District Court's dismissal of the complaint on the ground that the case required the court to determine a "political question." *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97 (D.D.C. 2007), *aff'd*, 571 F.3d 1227 (D.C. Cir. 2009). This Court reversed the Court of Appeals' "political question" ruling and remanded the case to the Court of Appeals for a decision on the merits of the constitutional issue. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). Ruling on the merits, the Court of Appeals held that the statute is unconstitutional because it "impermissibly infringes on the President's exercise of the recognition power."

1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in Western Jerusalem on October 17, 2002. Both his parents were born in the United States. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth.

Petitioner's mother applied for a passport and Consular Report of Birth Abroad ("CRBA") for her newborn son. She requested that the place of birth on both documents be designated as "Jerusalem, Israel."* Her request was denied. Although the routine designation for foreign-born American citizens lists the individual's country of birth and does not specify the city, petitioner's passport and his CRBA list only "Jerusalem" as his place of birth and do not include *any* country of birth.

2. State Department Policy

Rules regarding "Passport Preparation" appear in the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1380-1383. Pet. App. C, pp. 65a-68a, *infra*. Rules regarding "place of birth transcription" appear at 7 FAM 1383. They specify that "[a]s a general rule, enter the country of the applicant's birth in the passport." Pet. App. C, p. 65a.

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* This request was ultimately corrected with the government's consent to reflect a request that the documents record "Israel" as petitioner's place of birth. See 444 F.3d at 616, n.1.

Section 1383.5-6 of the FAM relates specifically to Jerusalem. It reads as follows:

> **7 FAM 1383.5-6 Jerusalem**
> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

A "birthplace transcription guide" appears as "Part II" of 7 FAM 1383 Exhibit 1383.1. With the listing of "JERUSALEM," the "guide" directs: "Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6."

Following "ISRAEL," the "guide" states: "Does not include Jerusalem or areas under military occupation. See section 7 FAM 1383.5-5."

It is undisputed that the State Department has followed the policy of rejecting applicants' requests to designate "Israel" as the birthplace of United

States citizens born in Jerusalem, even within Jerusalem's pre-1967 "municipal limits."

3. The Challenged Statute

Congress enacted H.R. 1646, the Foreign Relations Authorization Act for 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). President George W. Bush signed the law on September 30, 2002. Section 214 of the Act relates to "United States Policy with Respect to Jerusalem as the Capital of Israel." Subsection (d) directs the Secretary of State to identify a United States citizen born in Jerusalem, upon the citizen's request, as born in "Israel" on a passport or a Consular Report of Birth Abroad.

On signing the Act, the President made the following statement regarding all of Section 214, without identifying subsection (d) specifically (38 Weekly Compilation of Presidential Documents 1658 (Sept. 30, 2002)):

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the

terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

4. Petitioner's Standing Is Confirmed

Petitioner's parents filed a complaint seeking an injunction, mandamus, and declaratory relief on September 16, 2003. On September 7, 2004, the district court granted the government's motion to dismiss on the grounds that (1) the petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented a nonjusticiable "political question." 2004 WL 5835212 (D.D.C. 2004).

The court of appeals reversed the district court's decision regarding standing and remanded the case for discovery and the development of "a more complete record." 444 F.3d at 620.

5. The Government Acknowledges in Discovery That "Place of Birth" Is Designated Principally for Identification Purposes

The government admitted, in response to a Request for Admissions, that "United States citizens traveling in foreign countries are routinely identified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth." In response to another Request for Admissions, the government acknowledged that "identification is the principal reason" that U.S. passports require "place of birth."

6. The District Court Again Dismisses on "Political Question" Grounds

Following discovery, petitioner filed a motion for summary judgment. The government renewed its motion to dismiss and moved alternatively for summary judgment. The district court again issued an order granting the government's motion to dismiss on the ground that the court lacked subject-matter jurisdiction because the complaint "raises a quintessential political question which is not justiciable by the courts." 511 F. Supp. 2d at 102.

7. The Court of Appeals Affirms the Dismissal on "Political Question" Grounds

A majority of the court of appeals' panel affirmed the district court's dismissal on the ground that the complaint "raises a nonjusticiable political question." 571 F.3d 1227. In a concurring opinion Senior Circuit Judge Edwards asserted that "the political question doctrine has no application in this case." 571 F.3d at 1234-1236. Rehearing *en banc* was denied by a 6-to-3 vote. 610 F.3d 84.

8. This Court Grants Certiorari on the "Political Question" Issue and Directs the Parties To Brief and Argue the Merits of the Constitutional Issue

Petitioner sought this Court's review only on the "political question" issue. See Petition for a Writ of Certiorari, No. 10-699, filed on November 24, 2010. The Solicitor General opposed the petition on March 25, 2011. This Court granted the writ on May 2, 2011, with the following Order (*Zivotofsky v. Clinton*, 131 S. Ct. 2897):

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns."

9. This Court Reverses and Remands for Consideration of the Merits of the Constitutional Issue

This Court reversed the decision of the court of appeals, holding that "[t]he political question doctrine poses no bar to judicial review of this case." 132 S. Ct. at 1430. The Court did not, however, decide the constitutional issue that it had, *sua sponte*, instructed the parties to brief and argue. The Court observed, "To say that Zivotofsky's claim presents issues the Judiciary is competent to resolve is not to say that reaching a decision in this case is simple." 132 S. Ct. at 1430. Noting that "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers," this Court remanded the case so that the constitutional issue could be considered by the court of appeals "in the first instance."

10. The Court of Appeals Decides That the Statute Is Unconstitutional Because It Infringes on the President's "Exclusive" Recognition Power

Reciting a history of the "recognition power" (Pet. App. A, pp. 14a-26a, *infra*) that has been challenged by a leading scholar (see pp. 15-16, *infra*), acknowledging that this Court has never *held* (emphasis original) that the President is exclusively vested with the recognition power (p. 30a, *infra*), and noting that as an "inferior court" it is obliged to follow dicta of this Court (see p. 30a, *infra*, and the concurring opinion of Circuit Judge Tatel (pp. 53a-54a, *infra*)), the court of appeals ruled that the President has "exclusive" recognition authority. The court then affirmed dismissal of petitioner's complaint and refused to enforce the Congressional enactment on the ground that Section 214(d) unconstitutionally infringes on the exercise of the President's exclusive recognition power.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT CONSISTENTLY GRANTS CERTIORARI WHEN A FEDERAL COURT OF APPEALS HAS INVALIDATED A FEDERAL STATUTE ON CONSTITUTIONAL GROUNDS

When a federal court of appeals invalidated as unconstitutional the federal civil remedy for gender-motivated violence this Court granted certiorari in *United States v. Morrison*, 529 U.S. 598, 605 (2000), "[b]ecause the Court of Appeals invalidated a federal

statute on constitutional grounds." That justification for plenary review by this Court has, to our knowledge, been consistently applied. See, *e.g.*, *United States v. Kebodeaux*, 133 S. Ct. 2496, 2501 (2013); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 (1993).

The current edition of Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice § 4.12 at p. 264 (9th ed. 2007) states, "Where the decision below holds a federal statute unconstitutional . . . , certiorari is usually granted because of the obvious importance of the case." The Gressman treatise cites no case in which this Court has refused to review a lower-court judgment invalidating an Act of Congress on constitutional grounds.

Indeed, even when the United States has agreed with the lower court's determination that a federal law is unconstitutional (as it recently did with the Defense of Marriage Act), the Solicitor General has acknowledged that respect for Congress' legislative function requires review by this Court of lower-court decisions annulling a duly enacted federal statute. See the United States' Petition for a Writ of Certiorari, *United States Department of Health and Human Services v. Commonwealth of Massachusetts*, No. 12-15, p. 16 ("This Court's Review Is Warranted Because The Court Of Appeals Invalidated An Act of Congress.")

Justice Holmes observed in his separate opinion in *Blodgett v. Holden*, 275 U.S. 142, 148 (1927), that declaring an Act of Congress unconstitutional is "the gravest and most delicate duty" of the courts, and his

characterization was quoted with approval by this Court in *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In *United States v. Gainey*, 380 U.S. 63, 64 (1965), this Court expressed its obligation "to review the exercise of the grave power of annulling an Act of Congress." At that time – prior to the repeal of 28 U.S.C. § 1252 in 1988 – this Court had mandatory appellate jurisdiction over lawsuits in which the United States was a party and a three-judge district court found a federal law unconstitutional. See, *e.g.*, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 316-319 (1985); *McLucas v. Champlain*, 421 U.S. 21, 31-32 (1975).

When it repealed this Court's mandatory Section 1252 jurisdiction to review decisions invalidating Acts of Congress on constitutional grounds, Congress did not imply that this Court might avoid reviewing lower federal-court nullifications of duly enacted federal statutes. The House Report said, "Under usual circumstances any lower Federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review." H. Rep. No. 100-660, 100th Cong., 2d Sess., p. 21 (May 26, 1988). It is clear from the House Report that the mandatory-review provision was eliminated in 1988 only because the "interpretation of the jurisdictional statute" consumed too much of the Court's time (see, *e.g.*, *Heckler v. Edwards*, 465 U.S. 870 (1984)) and the direct-appeal procedure often failed to "produce a record that is useful for review by the Supreme Court." H. Rep. No. 100-660, p. 21.

We demonstrate below that the constitutional issues presented by this case warrant plenary review by this Court. But even if the legal issues presented were narrower and less significant – as they were in the *Morrison*, *Kebodeaux*, and *Edge Broadcasting Co.* cases – the fact alone that a lower court has annulled an Act of Congress would call for review by this Court.

II.

THIS COURT RECOGNIZED THE SIGNIFICANCE OF THE CONSTITUTIONAL ISSUE BY DIRECTING THE PARTIES IN 2011 TO BRIEF AND ARGUE THAT ISSUE IN ADDITION TO THE QUESTION PRESENTED IN THE PETITION

This Court's *sua sponte* order of May 2, 2011, directing the parties to brief and argue the constitutional recognition-power issue in addition to the Question Presented in the Petition for a Writ of Certiorari demonstrates the importance of the constitutional issue and its worthiness for plenary review. If the Court had some doubt in 2011 whether the constitutional issue warranted consideration and decision by this Court, it would not have taken the initiative of adding the constitutional recognition-power issue to the threshold political question issue that petitioner had presented in his request for this Court's review.

Although this Court did not ultimately resolve the constitutional issue that it had chosen to add to the briefing and argument of the case, the Court

indicated in its opinion remanding that issue to the lower court that the resolution of that question by the court of appeals should not be the final word. This Court's majority opinion declared that the constitutional issue was not "simple," and that this Court's "analysis of the merits" would benefit from "thorough lower court opinions." 132 S. Ct. at 1430-1431. It remanded the case to the lower court for its consideration "in the first instance," and implied that after the lower court's ruling, the constitutional issue would be finally considered and decided in the Supreme Court.

The court below has now considered the constitutional issue that this Court identified and remanded to the lower court for its "analysis of the merits." As Circuit Judge Tatel acknowledged in his concurring opinion, the court of appeals was "in relatively uncharted waters with few fixed stars by which to navigate" (p. 52a, *infra*). The important constitutional issue is now ripe for the contemplated consideration and decision by this Court.

III.

WHETHER THE PRESIDENT HAS "EXCLUSIVE" RECOGNITION POWER IS AN ISSUE OF GREAT NATIONAL IMPORTANCE

This Court's review in its 2012 majority opinion of the historical precedents marshaled by both sides regarding the recognition power (132 S. Ct. at 1428-1430) demonstrates that the constitutional question regarding the nature, source, and scope of the power has arisen repeatedly during our nation's history.

Presidents and Congresses have expressed differing views on the subject.

It is undisputed – as the court of appeals noted (p. 30a, *infra*) – that this Court has never directly addressed the issue and announced a square holding regarding it. Circuit Judge Tatel observed in his concurring opinion that "the Supreme Court has had no occasion to resolve the political branches' competing claims to recognition power" (p. 53a, *infra*).

Resolution of that question demands – as this Court observed in 2012 – "careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers." 132 S. Ct. at 1430. Now that the record in this case is complete, and the parties have marshaled conflicting textual and historical evidence going back to the founding of the Republic regarding the recognition power, along with conflicting dicta in this Court's opinions on the source and scope of that power, the recurring important issue is ripe for final resolution by this Court.

IV.

THE COURT OF APPEALS' HISTORICAL SURVEY IS ERRONEOUS AND CONFLICTS WITH AN AUTHORITATIVE SCHOLARLY ASSESSMENT

While acknowledging that ratification-era evidence fails to establish whether the Framers

intended to grant the President exclusive recognition power (pp. 16a-19a, *infra*), the court of appeals ruled in the government's favor because it "conclude[d] that longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." (p. 20a, *infra*). That conclusion is demonstrably erroneous.

The court below cited and relied on the ratification-era historical research of Professor Robert J. Reinstein of Temple University Law School. See Pet. App. A, pp. 3a, 17a n.7, 19a, *infra*. Professor Reinstein has now reviewed in great detail the post-ratification history that is discussed in the majority opinion of the court below and in the parties' briefs on the subject of the recognition power, beginning with the Washington Administration's conduct during the Neutrality Crisis of 1792-1793 through the relevant events during the Monroe, Jackson, Lincoln, and McKinley Administrations. His conclusions conflict with those of the court of appeals.

In an article containing his analysis that will shortly appear in the Temple Law Review and that is available now at http://ssrn.com/abstract=2351966, Professor Reinstein identified two instances not discussed in the lower-court opinion or in the briefs of the parties in which early Congresses exercised the recognition power. Congressional legislation in 1800 and 1806 recognized "the island of Hispaniola" as "a dependency of the French Republic" (2 Stat. 7, 10) and prohibited all trade with persons in Santo Domingo not "under the acknowledged government of France" (2 Stat. 351).

The latter Congressional statute was held by Supreme Court Justice Bushrod Washington, sitting on Circuit in *Clark v. United States*, 5 Fed. Cas. 932, 934 (C.C. Pa. 1811), to constitute nonrecognition of Haitian independence and to be "a clear acknowledgment of the sovereignty of France over the island."

Professor Reinstein's research also establishes that, contrary to the premise of the court below, Congress recognized Haiti and Liberia in 1862 and Cuban independence in 1898. He also discusses the Taiwan Relations Act of 1979 and subsequent legislation (including the Taiwan passport act of 1994) and demonstrates that Congress thereby legislated a policy governing recognition that was contrary to the Executive's.

We quote in full the "Conclusion" to Professor Reinstein's article (Robert Reinstein, "Is the President's Recognition Power Exclusive?"):

> Historical practice confirms that the President has the power to recognize foreign states and governments. But the text, original understanding, post-ratification history, and structure of the Constitution do not support the more expansive claim that this executive power is plenary. Under these circumstances, executive recognition decisions are not exclusive but are subject to laws enacted by Congress. In short, the President's duty remains to faithfully execute the laws.

Other legal scholars have severely criticized the court of appeals' reliance on the famous dictum in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See the recent writings of Professor Louis Fisher of William and Mary Law School, who served for four decades in the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and as specialist in constitutional law at the Law Library. Louis Fisher, "D.C. Circuit Court Adopts Old Judicial Error to Inflate Executive Power," *rollcall.com,* September 16, 2013; "Getting it Wrong Again and Again – Judicial Error's Compounding Effect," National Law Journal, November 18, 2013; "Judicial Errors that Magnify Presidential Power" to appear in The Federal Lawyer (forthcoming Jan. 2014). Professor Fisher articulates similar views at pp. xviii, 3-4, 265-68, 296-97, 387, 415 of his 2014 treatise titled "The Law of the Executive Branch, Presidential Power."

This criticism of the basis for the decision below warrants scrutiny of the lower court's ruling by this Court. Professor Reinstein observed in the comprehensive article that will be appearing in the Temple Law Review (emphasis original):

> The *Zivotofsky* decision is the first to hold that the recognition of foreign states and governments – and the determination of the scope of that recognition – is an *exclusive* executive power. This decision has significant implications for the separation of powers that go well beyond the question of recognition. If affirmed,

> this decision will mark only the second time that the Supreme Court will have held that a non-enumerated power of the President supersedes the legislative authority of Congress (the other being the power to remove executive officials) and the first in the field of foreign affairs.

The Court should grant certiorari not only to determine whether an Act of Congress was correctly nullified as unconstitutional and to decide an issue that it asked the parties to brief and argue, but also to resolve uncertainties on important issues affecting the Legislative and Executive branches of our government.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

November 20, 2013

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APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

Menachem Binyamin ZIVOTOFSKY, by his Parents and Guardians Ari Z. and Naomi Siegman ZIVOTOFSKY, Appellant
v.
SECRETARY OF STATE, Appellee.

No. 07–5347.
Argued March 19, 2013.
Decided July 23, 2013.

Appeal from the United States District Court for the District of Columbia (No. 03cv01921).

Nathan Lewin argued the cause for the appellant. Alyza D. Lewin was on brief.

Robert G. Kidwell was on brief for amici curiae Anti–Defamation League et al. in support of the appellant.

David I. Schoen was on brief for amicus curiae Zionist Organization of America in support of the appellant.

Paul Kujawsky was on brief for amicus curiae American Association of Jewish Lawyers and Jurists in support of the appellant.

Gregory E. Ostfeld, Elliot H. Scherker and Marc Stern were on brief for amicus curiae American

Jewish Committee in support of the appellant.

Theodore B. Olson was on brief for amici curiae Members of United States Senate et al. in support of the appellant.

Dana Kaersvang, Attorney, United States Department of Justice, argued the cause for the appellee. Stuart F. Delery, Acting Assistant Attorney General, Ronald C. Machen, Jr., United States Attorney, and Harold Hongju Koh, Legal Adviser, United States Department of State, were on brief. Lewis Yelin and Douglas N. Letter, Attorneys, United States Department of Justice, and R. Craig Lawrence, Assistant United States Attorney, entered appearances.

Before: HENDERSON, ROGERS and TATEL, Circuit Judges.

*200 Opinion for the Court filed by Circuit Judge HENDERSON.

Concurring opinion filed by Circuit Judge TATEL.

KAREN LECRAFT HENDERSON, Circuit Judge:

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107–228, 116 Stat. 1350, requires the Secretary (Secretary) of the United States Department of State (State Department) to record "Israel" as the place of birth on the passport of a United States citizen born in Jerusalem if the citizen or his guardian so

requests. *Id.* § 214(d), 116 Stat. at 1366. The Secretary has not enforced the provision, believing that it impermissibly intrudes on the President's exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign nations. We agree and therefore hold that section 214(d) is unconstitutional.

I. BACKGROUND

The status of the city of Jerusalem is one of the most contentious issues in recorded history. For more than two millennia, the city has been won and lost by a host of sovereigns. The controversy continues today as the state of Israel and the Palestinian people both claim sovereignty over the city. It is against this background that the dispute in this case arises.

Since the middle of the twentieth century, United States Presidents have taken a position of strict neutrality on the issue of which sovereign controls Jerusalem. After Israel declared its independence in 1948, President Harry S. Truman promptly recognized it as a foreign sovereign. *See* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power,* 45 U. RICH. L.REV.. 801, 804 (2011). Nevertheless, Presidents from Truman on have consistently declined to recognize Israel's—or any country's—sovereignty over Jerusalem. When Israel announced in 1948 that it intended to convene the inaugural meeting of its Parliament in a part of Jerusalem that it controlled, the United States declined to send a representative to attend the ceremonies; a State Department cable

explained that "the United States cannot support any arrangement which would purport to authorize the establishment of Israeli ... sovereignty over parts of the Jerusalem area." Shlomo Slonim, *Jerusalem in America's Foreign Policy, 1947–1997* at 123 (1998). During United Nations proceedings in 1967, the United States ambassador stated that the "continuing policy of the United States Government" was that "the status of Jerusalem ... should be decided not unilaterally but in consultation with all concerned." U.N. GAOR, 5th Emergency Sess., 1554th plen. mtg. ¶¶ 98–99, U.N. Doc. A/PV.1554 (July 14, 1967) (quotation marks omitted). As the Secretary summarized in response to interrogatories proposed in this case:

> Within the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel.

Def.'s Resps. to Pl.'s Interrogs. at 9, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv–1921 (D.D.C. June 5, 2006) (Joint Appendix (JA) 59). Therefore, "[t]he United States, like nearly all other countries, maintains its [Israeli] embassy *201 in Tel Aviv," *id.* at 8 (JA 58) (quotation marks omitted), not Jerusalem.

The State Department's Foreign Affairs Manual (FAM) contains passport administration rules that reflect the policy of neutrality. The FAM first directs in detail how the applicant's birthplace is to be stated on his passport. "As a general rule, enter the country of the applicant's birth in the [place of birth field on the] passport." 7 FAM 1383.1 (2002) (JA 111).[1] If, however, the applicant was born "in territory disputed by another country, the city or area of birth may be written" in lieu of the country. 7 FAM 1383.5–2 (JA 113). Similarly, an applicant may request that his passport list the "city or town, rather than the country, of [his] birth." 7 FAM 1383.6(a) (JA 115). Regarding Jerusalem, the FAM sets forth a detailed policy:

> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation....7 FAM 1383.5–6 (JA 115). The FAM specifically provides that, for an applicant born in Jerusalem: "Do not write Israel

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[1] All FAM provisions cited herein refer to the 2002 version, which was in effect during the relevant events.

or Jordan" on his passport and, further, that Israel "[d]oes not include Jerusalem...." 7 FAM 1383 Ex. 1383.1 pt. II (JA 127). In sum, the State Department must record "Jerusalem"—not "Jerusalem, Israel" or "Israel"—as the place of birth on the passport for an applicant born in Jerusalem after 1948.

Recently, the Congress has attempted to alter the Executive branch's consistent policy of neutrality. In 1995, it enacted the Jerusalem Embassy Act, which provides that "Jerusalem should be recognized as the capital of the State of Israel"; "the United States Embassy in Israel should be established in Jerusalem no later than May 31, 1999"; and "[n]ot more than 50 percent of the funds appropriated to the Department of State for fiscal year 1999 for 'Acquisition and Maintenance of Buildings Abroad' may be obligated until the Secretary of State determines and reports to Congress that the United States Embassy in Jerusalem has officially opened." Pub.L. No. 104–45, § 3(a)-(b), 109 Stat. 398, 399 (1995) (enacted into law without President's signature). During the Congress's consideration of the legislation, the Executive branch communicated with the Congress regarding its constitutionality. *See* 164 CONG. REC. S15,463 (daily ed. Oct. 23, 1995). The United States Department of Justice (DOJ) *via* an assistant attorney general wrote to the White House Counsel: "It is well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States," that "the President's recognition power is exclusive" and that "[t]he

proposed bill would severely impair the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations." *Id.* at S 15,468. The DOJ official explained that his conclusions were "not novel"; for example, "[t]he Reagan Administration objected in 1984 to a bill to compel*202 the relocation of the United States Embassy from Tel Aviv to Jerusalem, on the grounds that the decision was so closely connected with the President's exclusive constitutional power [and] responsibility to recognize, and to conduct ongoing relations with, foreign governments as to, in our view, be beyond the proper scope of legislative action." *Id.* at S15,469 (quotation marks omitted). Similarly, the then-Secretary expressed opposition to the legislation in a letter to the Senate Majority Leader. *Id.* The Secretary explained that "[t]here is no issue related to the Arab–Israeli negotiations that is more sensitive than Jerusalem" and "any effort by Congress to bring it to the forefront is ill-advised and potentially very damaging to the success of the peace process." *Id.* He echoed the DOJ official's doubts regarding the bill's constitutionality. *Id.* Ultimately, the Congress enacted the legislation with a waiver provision authorizing the President to suspend the funding restriction for six-month periods to "protect the national security interests of the United States." Pub.L. No. 104–45 § 7, 109 Stat. at 400.

On September 30, 2002, President George W. Bush signed into law the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107–228, 116 Stat. 1350. Section 214(d) is the provision at issue and it provides:

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES.—For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

Id. § 214(d), 116 Stat. at 1366.[2]

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[2] Section 214 provides in full:

SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL.

(a) CONGRESSIONAL STATEMENT OF POLICY.—The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995 (Public Law 104–45; 109 Stat. 398), to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.

(b) LIMITATION ON USE OF FUNDS FOR CONSULATE IN JERUSALEM.—None of the funds authorized to be appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.

(c) LIMITATION ON USE OF FUNDS FOR PUBLICATIONS.—None of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES.—For purposes of the registration of

When the President signed the Act, however, he also issued a signing statement, noting that "the Act contains a number of provisions that impermissibly interfere with the constitutional functions of the presidency in foreign affairs," including section 214:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. *203 Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.
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> Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2002 WL 31161653 (Sept. 30, 2002).

Menachem Zivotofsky (Zivotofsky) is a United States citizen born in 2002 in Jerusalem to parents

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birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

Pub.L. No. 107–228 § 214, 116 Stat. at 1365–66.

who are United States citizens. Compl. ¶¶ 2–5, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv–1921 (D.D.C. Sept. 16, 2003) (JA 8–9); *see also* 8 U.S.C. § 1401(c) (making "national [ ] and citizen[ ] of the United States at birth ... a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person"). In 2002, Zivotofsky's mother applied for a United States passport for Zivotofsky, listing his birthplace as "Jerusalem, Israel." *Id.* ¶ 8 (JA 9). The State Department, however, following its Jerusalem policy set forth in 7 FAM 1383.5–6, issued a passport in Zivotofsky's name listing "Jerusalem" as his place of birth. *Id.*

On September 16, 2003, Zivotofsky, "by his parents and guardians, Ari Z. and Naomi Siegman Zivotofsky," brought suit against the Secretary, seeking, *inter alia,* declaratory relief and a permanent injunction ordering the Secretary to issue him a passport listing "Jerusalem, Israel" as his place of birth. *Id.* at 3 (JA 10).[3] The litigation has been up and down the appellate ladder. First, on September 7, 2004, the district court dismissed the case, concluding that Zivotofsky lacked Article III

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[3] Zivotofsky's complaint alleged that the State Department also improperly recorded his place of birth on his consular report of birth abroad as "Jerusalem." At oral argument, however, Zivotofsky's counsel made clear that he raised no legal argument distinguishing the consular report of birth abroad from the passport. Oral Arg. Tr. 23–24.

standing and, alternatively, that the case presented a nonjusticiable political question. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv–1921, 2004 WL 5835212 (D.D.C. Sept. 7, 2004). We subsequently reversed and remanded, holding that Zivotofsky had standing.[4] *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* 444 F.3d 614 (D.C.Cir.2006). We noted that Zivotofsky had amended the injunctive relief he initially sought, requesting that the Secretary record "Israel" instead of "Jerusalem, Israel" as his place of birth on his passport. *Id.* at 616 n. 1. Because "[t]he case ... no longer involve[d] the claim the district court considered," we "remand[ed] the case to the district court so that both sides may develop a more complete record relating to these and other subjects of dispute." *Id.* at 619–20.

On September 19, 2007, the district court again dismissed the case, once more deciding it presented a nonjusticiable political question. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* 511 F.Supp.2d 97 (D.D.C.2007) (*Zivotofsky II.*) We affirmed, concluding that "[b]ecause the judiciary has no authority to order the Executive Branch to change the nation's foreign policy in this matter, this case is nonjusticiable under the political question doctrine." *204*Zivotofsky v. Sec'y of State,* 571 F.3d 1227, 1228 (D.C.Cir.2009) (*Zivotofsky IV*).[5]

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[4] We did not reach the political question issue.

[5] Senior Judge Edwards concurred, noting that he would have rejected Zivotofsky's claim on the merits. *Zivotofsky IV,* 571 F.3d at 1233–34 (Edwards, J., concurring).

The United States Supreme Court vacated and remanded, holding that the case does not present a political question. *Zivotofsky ex rel. Zivotofsky v. Clinton,* —— U.S. ——, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012) (*Zivotofsky V.*) The Court explained that "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches.... [i]nstead, Zivotofsky requests that the courts enforce a specific statutory right." *Id.* at 1427. Given that the parties do not dispute the substance of section 214(d), that is, its requirement that "Israel" be recorded on the passport as the applicant's birthplace at his request, "the only real question for the courts is whether the statute is constitutional," which requires "deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution." *Id.* at 1427–28. The Court further explained that "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers." *Id.* at 1430.

II. THE MERITS

Before addressing the merits, we address two preliminary matters. First, Zivotofsky argues that we must "'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.' " *United States v. Brinson–Scott,* 714 F.3d 616, 621 (D.C.Cir.2013) (quoting *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)). Zivotofsky maintains that we should

not reach the Secretary's constitutional defense because section 214(d) constitutes permissible passport legislation. But Zivotofsky's proposed solution—that we hold in effect that the President's constitutional recognition power is not so broad as to encompass section 214(d)—*is* a constitutional holding. We would not avoid "pass[ing] upon a constitutional question" by resolving the case in that manner; instead we would give the President's constitutional power the narrow construction Zivotofsky presses. Moreover, the Supreme Court has specifically instructed us to examine "the textual, structural, and historical evidence ... regarding the nature ... of the passport and recognition powers." *Zivotofsky V,* 132 S.Ct. at 1430.

[1][2][3][4] Second, in *Youngstown Sheet & Tube Company v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson set forth a tripartite framework for evaluating the President's powers to act depending on the level of congressional acquiescence. *Id.* at 635, 72 S.Ct. 863 (Jackson, J., concurring); *see also Medellin v. Texas,* 552 U.S. 491, 524, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown,* 343 U.S. at 635, 72 S.Ct. 863. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon

his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which *205 its distribution is uncertain." *Id.* at 637, 72 S.Ct. 863. Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* Both parties agree that this case falls into category three. In this category the President may nonetheless exercise—and the Congress cannot invade—the President's "exclusive power." *Id.* at 637 n. 4, 72 S.Ct. 863. The question here is whether exclusive Executive branch power authorizes the Secretary to decline to enforce section 214(d).

A. The Recognition Power

[5][6][7][8] Recognition is the act by which "a state commits itself to treat an entity as a state or to treat a regime as the government of a state." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 94(1). "The rights and attributes of sovereignty belong to [a state] independently of all recognition, but it is only after it has been recognized that it is assured of exercising them." 1 John Bassett Moore, *A Digest of International Law* § 27, at 72 (1906) (MOORE'S INT'L LAW DIGEST). Recognition is therefore a critical step in establishing diplomatic relations with the United States; if the United States does not recognize a state, it means the United States is "unwilling[ ] to acknowledge that the government in

question speaks as the sovereign authority for the territory it purports to control." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Recognition also confers other substantial benefits. For example, a recognized sovereign generally may (1) maintain a suit in a United States court, *see id.* at 408–09, 84 S.Ct. 923; *Guaranty Trust Co. v. United States,* 304 U.S. 126, 137, 58 S.Ct. 785, 82 L.Ed. 1224 (1938); (2) assert the sovereign immunity defense in a United States court, *see Nat'l City Bank v. Rèpublic of China,* 348 U.S. 356, 359, 75 S.Ct. 423, 99 L.Ed. 389 (1955); and (3) benefit from the "act of state" doctrine, which provides that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," *Oetjen v. Cent. Leather Co.,* 246 U.S. 297, 303, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (quotation marks omitted).

[9][10] A government typically recognizes a foreign state by "written or oral declaration." 1 MOORE'S INT'L LAW DIGEST § 27, at 73. Recognition may also be implied as "when a [recognizing] state enters into negotiations with the new state, sends it diplomatic agents, receives such agents officially, gives exequaturs to its consuls, [and] forms with it conventional relations." [6] *Id.; see*

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[6] An exequatur is a "document from the host country [to a foreign consul] that permits the consul to take up consular functions." Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs,* 111 YALE L.J. 231, 313 (2001).

also David Gray Adler, *The President's Recognition Power, reprinted in The Constitution and the Conduct of American Foreign Policy* 133 (David Gray Adler & Larry N. George eds., 1996) ("At international law, the act of receiving an ambassador of a foreign government entails certain legal consequences. The reception of an ambassador constitutes a formal recognition of the sovereignty of the state or government represented.").

As noted earlier, the Supreme Court has directed us to examine the "textual, structural, and historical evidence" the parties have marshaled regarding "the nature ... of the passport and recognition powers." *206 *Zivotofsky V,* 132 S.Ct. at 1430. We first address the recognition power and, in particular, whether the power is held exclusively by the President.

B. The President and the Recognition Power

Text and Originalist Evidence

Neither the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power. In support of his view that the recognition power lies exclusively with the President, the Secretary cites the "receive ambassadors" clause of Article II, Section 3 of the Constitution, which provides, *inter alia,* that the President "shall receive Ambassadors and other public Ministers." U.S. CONST., art. II, § 3. But the fact that the President is empowered to receive

ambassadors, by itself, does not resolve whether he has the exclusive authority to recognize foreign nations. Some scholars have suggested other constitutional provisions as possible sources of authority for the President to exercise the recognition power but conclude that the text of those provisions does not itself resolve the issue.[7]

[11] Originalist evidence also fails to clarify the Constitution's text. The Federalist Papers contain no mention of the recognition power although Federalist No. 69, written by Alexander Hamilton under the pseudonym "Publius," refers to the "receive ambassadors" clause. Writing in 1788, Hamilton characterized the clause as virtually meaningless:

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[7]*See, e.g.,* Reinstein, *supra,* at 809 & n. 48, 810–11, 816 (discussing, but finding inconclusive, text of U.S. CONST., art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST., art. II, § 2, cl. 2 (President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors [and] other public Ministers and Consuls"); U.S. CONST., art. II, § 3 ("[President] shall take Care that the Laws be faithfully executed") as compared with legislative powers set forth in U.S. CONST., art. I, § 8, cls. 3, 4, 11, 18 ("The Congress shall have Power To ... regulate Commerce with foreign Nations, ... establish an uniform Rule of Naturalization, ... declare War ... [and] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers")); *see also* Prakash & Ramsey, *supra,* at 234–35, 253, 316–17 (interpreting Executive Vesting Clause, U.S. CONST., art. II, § 1, cl. 1., and using, *inter alia,* eighteenth-century meaning of executive power).

> [T]hough it has been a rich theme of declamation,[8] [it] is more a matter of dignity than of authority[,].... a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor.

Alexander Hamilton, Federalist No. 69, *reprinted in The Federalist* 360 (George W. Carey & James McLellan eds.2001). The President's power to receive ambassadors may of necessity mean that he has the power not only to "receive" a foreign ambassador but also to decide whether and when to receive him.[9] In fact, five years *207 after writing Federalist No. 69, Hamilton adopted this interpretation of the "receive ambassadors" clause. In 1793, while serving in President George Washington's cabinet, Hamilton, then writing as "Pacificus," declared that the clause gave the President the power to determine whether the government sending the ambassador should be

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[8] Scholars, it appears, have been unable to confirm Hamilton's claim that the "receive ambassadors" clause "has been a rich theme of declamation." *See* Reinstein, *supra*, at 845–46.

[9] According to the Restatement, when the President receives an ambassador, he recognizes by implication the sovereignty of the sending foreign government. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204, Reporters' Note 2 ("Recognition of a state has been effected by ... receiving the credentials of a diplomatic representative of that state.").

recognized by the United States. United States National Archives, *Pacificus No. 1* (June 29, 1793), *available at* http:// founders. archives. gov/ documents/ Hamilton/ 01– 15– 02– 0038. Hamilton explained that "[t]he Legislative Department is not the *organ* of intercourse between the UStates and foreign Nations.... It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers...." *Id.* Rather, "[t]he right of the Executive to receive ambassadors and other public Ministers.... includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognised or not." *Id.*

There is little other ratification-era evidence regarding the recognition of foreign governments. In fact, "there is no record that the subject of recognizing foreign states or governments ever came up in the [Constitutional] Convention." Reinstein, *supra,* at 845. One scholar offers two explanations for this gap. First, he suggests that "the founders carefully enumerated the powers of the President and deliberately omitted the recognition power." *Id.* at 860. But if this were the case, it would be unclear which branch, if any, possessed the power. His second explanation is more plausible: "Whether the European nations would accept the United States into their community was of considerable importance to the new nation, but whether the United States would 'recognize' the European nations was a non[ ]sequitur." *Id.* at 861. In other words, the Framers apparently were not concerned with how their young

country recognized other nations because the issue was not important to them at the time of ratification.

Post-ratification History

[12] Both parties make extensive arguments regarding the post-ratification recognition history of the United States. As the Supreme Court has explained, longstanding and consistent post-ratification practice is evidence of constitutional meaning. *See, e.g., Republican Party of Minn. v. White,* 536 U.S. 765, 785, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) ("[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional...." (quotation marks omitted)); *Mistretta v. United States,* 488 U.S. 361, 401, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) ("Our 200–year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity."); *Marsh v. Chambers,* 463 U.S. 783, 790, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) ("two centuries of national practice," including practice authorized by first Congress, provides "contemporaneous and weighty evidence" of constitutionality (quotation marks omitted)). We conclude that longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power.

Beginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations. *208 In 1793, President

Washington's cabinet unanimously concluded that Washington need not consult with the Congress before receiving the minister from France's post-revolutionary government, notwithstanding his receiving the minister recognized the new government by implication. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs,* 111 YALE L.J. 231, 312 (2001). Nor did the Congress "purport[ ] to tell Washington which countries or governments to recognize." *Id.* at 312–13. The Washington administration also took sole control of issuing exequaturs to foreign consuls. *Id.* at 313 (President Washington "not only signed exequaturs, he also set policy respecting their issuance" (footnote omitted)); *see also* 3 Thomas Jefferson, *Memoir, Correspondence, and Miscellanies from the Papers of Thomas Jefferson* 298 (Thomas Jefferson Randolph ed. 1829) ("[T]he commission of consul to M. Dannery ought to have been addressed to the President of the United States. He being the *only* channel of communication between this country and foreign nations, *it is from him alone* that foreign nations or their agents are to learn what is or has been the will of the nation...." (emphases added)).

In 1817, President James Monroe prevailed in a standoff with Speaker of the House Henry Clay over the recognition power. Clay had announced that he "intended moving the recognition of Buenos Ayres and probably of Chile." Julius Goebel, Jr. *The Recognition Policy of the United States* 121 (1915). But when Clay attempted to amend an appropriations bill to appropriate $18,000 for an

American minister to be sent to South America, *id.* at 123–24, he was forced to modify the amendment to manifest that the decision whether to send the minister belonged to the President, *see* 32 ANNALS OF CONGRESS 1498–1500 (1818). And, in fact, even Clay's weakened amendment was defeated in the House; "the reason for the defeat appears to have been that the amendment was interfering with the functions of the executive." *Goebel, supra,* at 124; *see also* 32 ANNALS OF CONG. 1538 (1818) (statement of Rep. Smith) ("The Constitution has given ... to the President the direction of our intercourse with foreign nations. It is not wise for us to interfere with his powers...."); *id.* at 1570 (statement of Rep. Smyth) ("[T]he acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation."). According to Goebel, Clay's defeat "meant a great increase of strength for the administration" because "it had received a direct confirmation of its ultimate right to determine whether a government was to be recognized." *Goebel, supra,* at 124.

In 1864 and, again, 1896, the Executive branch challenged the individual houses of the Congress for intruding into the realm of recognition, which eventually led the Congress to refrain from acting. In 1864, the House passed a resolution asserting that it did not acknowledge Archduke Ferdinand Maximilian von Habsburg as the Emperor of Mexico. CONG. GLOBE, 38TH CONG., 1ST SESS. 1408 (1864). The then-Secretary wrote to the United

States Minister to France, stating that the recognition authority is "purely executive," belonging "not to the House of Representatives, nor even to Congress, but to the President." *Id.* at 2475. The Senate ultimately did not act on the bill.[10] In 1896, *209 the Senate Foreign Relations Committee presented a joint resolution to the full Senate purporting to recognize Cuba's independence. 29 CONG. REC. 326, 332 (1896). The then-Secretary responded with a statement that the power to "recognize the so-called Republic of Cuba as an independent State rests solely with the Executive"; a joint resolution would have only "advice of great weight." Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEX. L.REV. 866–67 (1972) (quotation marks omitted); *see also* Congress Powerless, N.Y. TIMES, Dec. 19, 1896, *available at* http:// query. nytimes. com/ mem/ archive- free/ pdf? res= F 10 D 13 F 73 B 5 F 1 B 73 8 DDDA 90 A 94 DA 415 B 8685 F 0 D 3. Again, the Senate did not act on the proposed joint resolution.

In 1919, the Congress once again relented in response to the President's assertion of exclusive recognition power. That year, the Senate considered a resolution which recommended withdrawing recognition of the then-existing Mexican

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[10] The House subsequently passed a resolution that stated, in pertinent part, "Congress has a constitutional right to an authoritative voice in declaring and prescribing the ... recognition of new Powers as in other matters...." CONG. GLOBE, 38TH CONG., 2D SESS. 65–67 (1864). The Senate never acted on the resolution. Edward S. Corwin, *The President's Control of Foreign Relations* at 42–43 (1917).

government. PRELIM. REPORT & HR'GS OF THE SEN. COMM. ON FOREIGN RELATIONS, INVESTIGATION OF MEXICAN AFFAIRS, S. DOC. NO.. 66–285, at 843D (2d. Sess.1919–20). In response, President Woodrow Wilson informed the Congress that the resolution, if enacted, would "constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to the guidance of our foreign affairs" because "the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the Executive, only." *Id.* "Within half an hour of the letter's receipt[,] Senator Lodge, Chairman of the Foreign Relations Committee, announced that the [ ] resolution was dead. President Wilson, Mr. Lodge said, must now accept entire responsibility for Mexican relations." Wilson Rebuffs Senate on Mexico, N.Y. TIMES, Dec. 8, 1919, *available at* http:// query. nytimes. com/ mem /archive-free/pdf?res=9C00 E2DD123BEE32A 2575AC0A964 9D946896D6CF.

Zivotofsky marshals several isolated events in support of his position that the recognition power does not repose solely in the Executive but they are unconvincing. First, Zivotofsky argues that in 1898 the Senate passed a joint resolution stating "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that Island." Br. for Appellant 42. But review of the Congressional Record shows that the quoted language was not included in the joint resolution; rather, it was included in a *proposed* joint

resolution in the Senate. *See* 31 CONG. REC. 3988 (1898). And the proposed resolution raised separation-of-powers concerns with many Senators. *See id.* at 3990 (statement of Sen. Gorman) ("I regret exceedingly ... for the first time in the history of the country, this great body should incorporate ... a power which has been disputed by every Executive from Washington down—the right of Congress by law to provide for the recognition of a state."); *id.* at 3991 (statement of Sen. Allison (calling amendment "contravention of ... well-settled principles" and Executive "alone can deal with this question in its final aspects")); *id.* at 3991–92 (statement of Sen. Aldrich) ("We have no right at such a time to exercise functions that belong to the Executive."). When the House received the proposed joint resolution, it removed the recognition clause. *See id.* at 4080. The joint resolution,*210 as passed, stated only that "the people" of Cuba were "free and independent." *See* 30 Stat. 738 (Apr. 20, 1898).[11]

Zivotofsky also relies on events that occurred during the administrations of President Andrew Jackson and President Abraham Lincoln. In both instances, however, the Congress did not attempt to exercise the recognition power. Instead, it authorized appropriations to be used by the President to dispatch diplomatic representatives. In 1836,

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[11] The joint resolution provided in full: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, First. That the people of the Island of Cuba are, and of right ought to be, free and independent." 30 Stat. 738 (Apr. 20, 1898).

President Jackson expressed a desire to "unite" with the Congress before recognizing Texas as independent from Mexico. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES UPON THE SUBJECT OF THE POLITICAL, MILITARY, AND CIVIL CONDITION OF TEXAS, H.R. DOC. NO.. 24–35, at 4 (2d Sess.1836). But in doing so, Jackson did not suggest that he lacked the exclusive recognition power. *See id.* at 2 ("[O]n the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject."). Rather, Jackson merely enlisted the support of the Congress as a matter of political prudence. In any event, the Congress did not attempt to exercise the recognition power on its own. Instead, the Congress appropriated funds for the President to authorize a "diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States ... shall deem it expedient to appoint such minister." 5 Stat. 107 (1837). Similarly, President Lincoln expressed a desire to coordinate with the Congress by requesting that it use its appropriations authority to endorse his recognition of Liberia and Haiti. *See* Lincoln's First Annual Message to Congress (Dec. 3, 1861), *available at* http:// www. presidency. ucsb. edu/ ws/? pid= 29502. And the Congress subsequently did so. 12 Stat. 421.[12]

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[12] Zivotofsky also calls our attention to the recognition of Hungary during President Zachary Taylor's administration. The Secretary wrote to the President's appointed minister to Hungary: "Should the new government prove to be, in your

opinion, firm and stable, the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary." Letter from Clayton to Mann (June 18, 1849), *reprinted in* 1 MOORE'S INT'L L. DIGEST § 75, at 246. Zivotofsky argues that the letter manifests Taylor's uncertainty regarding his exclusive recognition authority. But another communication from President Taylor made clear that he understood that he was authorized to recognize Hungary without the Congress. *See* 5 A Compilation of the Messages and Papers of the Presidents, 1789–1897 at 12 (James D. Richardson ed.1897) (State of the Union address) ("I thought it my duty, in accordance with the general sentiment of the American people, ... to stand prepared, upon the contingency of the establishment by her of a permanent government, to be the first to welcome independent Hungary into the family of nations. For this purpose *I invested an agent then in Europe with power to declare our willingness promptly to recognize her independence in event of her ability to sustain it.*" (emphasis added)). Whatever Taylor's uncertainty, it sounds alone in stark contrast to otherwise seamless post-ratification history. In addition, Amicus American Jewish Committee supplies other examples of Presidential enlistment of the Congress's support. *See, e.g.,* Am. Jewish Committee Amicus Br. at 9–10 (Washington considered removing diplomatic authority of France's minister and instructed Thomas Jefferson to draft message stating he intended to remove Genet's diplomatic authority unless either house objected). None of them acknowledge either expressly or by implication that the recognition power was one shared, under the Constitution, with the Congress. We are also unpersuaded by amicus's citation to Secretary of State James Buchanan's observation that "recognition is usually effected, either by a nomination to, and confirmation by the Senate of a Diplomatic or Consular agent to the new Government, or by an act of Congress." 1 MOORE'S INT'L L. DIGEST § 75, at 245–46.

*211 *Supreme Court Precedent*

[13][14] It is undisputed that "in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.' " *Clinton v. City of New York,* 524 U.S. 417, 445, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (quoting *United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936)). While the President's foreign affairs powers are not precisely defined, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 634–35, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring), the courts have long recognized the President's presumptive dominance in matters abroad. *See, e.g., Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 415, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."); *Youngstown,* 343 U.S. at 610, 72 S.Ct. 863 (President has "vast share of responsibility for the conduct of our foreign relations") (Frankfurter, J., concurring); *Johnson v. Eisentrager,* 339 U.S. 763, 789, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) ("President is exclusively responsible" for "conduct of diplomatic and foreign affairs"); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State,* 104 F.3d 1349, 1353 (D.C.Cir.1997) ("[C]ourts have been wary of second-guessing executive branch decision[s] involving complicated foreign policy matters."). Thus, the

Court, echoing the words of then-Congressman John Marshall, has described the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." *Curtiss–Wright,* 299 U.S. at 319, 57 S.Ct. 216 (quoting 10 ANNALS OF CONG. 613 (Mar. 7, 1800)).

[15] The Supreme Court has more than once declared that the recognition power lies exclusively with the President. *See Williams v. Suffolk Ins. Co.,* 38 U.S. 415, 420, 13 Pet. 415, 10 L.Ed. 226 (1839) ("[If] the executive branch ... assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department[.]"); *United States v. Belmont,* 301 U.S. 324, 330, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) ("[T]he Executive had authority to speak as the sole organ of th[e] government" in matters of "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto...."); *Guaranty Trust Co. v. United States,* 304 U.S. 126, 138, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) ("We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government...."); *United States v. Pink,* 315 U.S. 203, 229, 62 S.Ct. 552, 86 L.Ed. 796 (1942) ("The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.... [including t]h[e] authority ... [to determine] the government to be recognized."); *Baker v. Carr,* 369 U.S. 186, 213, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)

("[I]t is the executive that determines a person's status as representative of a foreign government."); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("Political recognition is exclusively *212 a function of the Executive."). To be sure, the Court has not *held* that the President exclusively holds the power. But, for us—an inferior court—"carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative," *United States v. Dorcely,* 454 F.3d 366, 375 (D.C.Cir.2006) (quotation marks omitted); *see also Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.), especially if the Supreme Court has repeated the dictum, *see Overby v. Nat'l Ass'n of Letter Carriers,* 595 F.3d 1290, 1295 (D.C.Cir.2010) (Supreme Court dictum is "especially" authoritative if "the Supreme Court has reiterated the same teaching").

In *Williams v. Suffolk Insurance Company,* the issue before the Court was whether "the Falkland islands ... constitute any part of the dominions within the sovereignty of the government of Buenos Ayres." 38 U.S. at 419. The Court decided that the President's action in the matter was "conclusive on the judicial department." *Id.* at 420.

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial

> department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

Id. Similarly, in *Banco Nacional de Cuba v. Sabbatino,* without determining whether the United States had de-recognized Cuba's government under Fidel Castro, the Court explained that "[p]olitical recognition is exclusively a function of the Executive." 376 U.S. at 410, 84 S.Ct. 923. The Court emphasized that were it to decide for itself whether Cuba had been de-recognized, there would be a real "possibility of embarrassment to the Executive Branch in handling foreign relations." *Id.* at 412, 84 S.Ct. 923.

President Franklin D. Roosevelt's 1933 recognition of the Soviet Union led to three cases supporting the conclusion that the President exclusively holds the recognition power. *Belmont,* 301 U.S. 324, 57 S.Ct. 758; *Guaranty Trust,* 304 U.S. 126, 58 S.Ct. 785; *Pink,* 315 U.S. 203, 62 S.Ct. 552. On November 16, 1933, the United States recognized the Soviet Union as the government of Russia "and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims." *Pink,* 315 U.S. at 211, 62 S.Ct. 552. Under the Litvinov Assignment, the Soviet Union

agreed to "take no steps to enforce claims against American nationals; but all such claims were released and assigned to the United States." *Belmont,* 301 U.S. at 326, 57 S.Ct. 758. When the United States sought to collect on the assigned claims, its action spawned litigation resulting in the three cases.

In *Belmont,* the Court held that New York State's conflicting public policy did not prevent the United States from collecting assets assigned by the Litvinov Assignment. *Id.* at 330, 57 S.Ct. 758. It noted that "who is the sovereign of a territory is not a judicial question, but one the determination of which by the *political departments* conclusively binds the courts." *Id.* at 328, 57 S.Ct. 758 (emphasis added). But the Court then more specifically explained that "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction" and plainly "within*213 the competence *of the President.*" *Id.* at 330, 57 S.Ct. 758 (emphasis added). Moreover, "in respect of what was done here, the *Executive had authority to speak as the sole organ of that government.* The assignment and the agreements in connection therewith *did not, as in the case of treaties, ... require the advice and consent of the Senate.*" *Id.* (emphases added). In other words, the Court not only emphasized the President's exclusive recognition power but also distinguished it from the *shared* treaty power.

In *Guaranty Trust,* the Court held that a United States claim for payment of funds held in a bank

account formerly owned by Russia was barred by New York State's statute of limitations. 304 U.S. at 130, 143–44, 58 S.Ct. 785. In so doing, it relied on the Executive branch's recognition determination: which "government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.... We accept as conclusive here *the determination of our own State Department* that the Russian State was represented by the Provisional Government." *Id.* at 137–38, 58 S.Ct. 785 (emphasis added).

Finally, the Supreme Court in *Pink,* following *Belmont,* held that New York State could not "deny enforcement of a claim under the Litvinov Assignment because of an overriding [state] policy." *Pink,* 315 U.S. at 222, 62 S.Ct. 552. The Court defined the recognition power broadly and placed it in the hands of the President:

> The *powers of the President* in the conduct of foreign relations included the power, *without consent of the Senate,* to determine the public policy of the United States with respect to the Russian nationalization decrees.... That authority is not limited to a determination of the government to be recognized. It *includes the power to determine the policy which is to govern the question of recognition.* Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts....

Id. at 229, 62 S.Ct. 552 (citations omitted and emphases added).

The Court also treated the recognition power as belonging exclusively to the Executive in *Baker v. Carr.* It explained that "recognition of [a] foreign government[ ] so strongly defies judicial treatment that without *executive recognition* a foreign state has been called a republic of whose existence we know nothing." 369 U.S. at 212, 82 S.Ct. 691 (quotation marks and footnote omitted). The Court further explained that "the judiciary *ordinarily follows the executive* as to which nation has sovereignty over disputed territory" and that "it is *the executive* that determines a person's status as representative of a foreign government." *Id.* at 212–13, 82 S.Ct. 691 (emphases added).

Zivotofsky relies on *United States v. Palmer,* 16 U.S. 610, 3 Wheat. 610, 4 L.Ed. 471 (1818), where the Court stated that "the courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." *See id.* at 643. But this observation simply means that the judiciary will not decide the question of recognition. When the High Court has discussed the recognition power with more specificity, as it did in the above-cited cases, it has not merely stated that the judiciary lacks authority to decide the issue but instead has explained that the President has the *exclusive* authority. In addition, Zivotofsky's reliance on *Cherokee Nation v. Georgia,* 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831), is misplaced as the case dealt with

the recognition of Indian tribes which, the *214 *Cherokee Nation* opinion itself explains, are materially distinct from foreign nations. *See id.* at 18 (Marshall, C.J.); *see also Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior,* 255 F.3d 342, 345 (7th Cir.2001) ("Indian tribes are not foreign [states]....").[13]

[16] Having reviewed the Constitution's text and structure, Supreme Court precedent and longstanding post-ratification history, we conclude that the President exclusively holds the power to determine whether to recognize a foreign

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[13] Zivotofsky also cites three other cases he contends indicate the recognition power lies with both "political departments." They include: " *Boumediene v. Bush,* 553 U.S. 723, 753 [128 S.Ct. 2229, 171 L.Ed.2d 41] (2008) ('[T]he Court has held that questions of sovereignty are for *the political branches* to decide.'); *Vermilya–Brown Co. v. Connell,* 335 U.S. 377, 380 [69 S.Ct. 140, 93 L.Ed. 76] (1948) ('[T]he determination of sovereignty over an area is for *the legislative and executive departments*....'); [and] *Jones v. United States,* 137 U.S. 202, 214 [11 S.Ct. 80, 34 L.Ed. 691] (1890) ('[A]ll courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts *of the legislature and executive*....')." Br. for Appellant 43 (emphases in brief). But *Boumediene, Vermilya–Brown* and *Jones* do not involve the recognition of a foreign power; rather, they relate to the authority of the United States over a given territory. Because the Congress has the enumerated constitutional power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST., art. IV, § 3, cl. 2, the three cases are distinguishable.

sovereign.[14]

C. Section 214(d) and the "Passport Power" vis-à-vis the Recognition Power

Having concluded that the President exclusively holds the recognition power, we turn to the "passport power," pursuant to which section 214(d) is alleged to have been enacted. We must decide whether the Congress validly exercised its passport power in enacting section 214(d) or whether section 214(d) "impermissibly intrudes" on the President's exclusive recognition power. *Zivotofsky V,* 132 S.Ct. at 1428.

Zivotofsky first contends that section 214(d) is a

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[14] Zivotofsky points to early legal scholarship, including a treatise written by William Rawle: "The legislature indeed possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until that sense is declared, the act of the executive is binding." William Rawle, *A View of the Constitution of the United States of America* 195–96 (Philip H. Nicklin 2d ed. 1829). In 1833, Justice Joseph Story wrote that the recognition question was an "abstract statement [ ] under the constitution" that was "still open to discussion." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1566 (Little & Brown 2d ed. 1851). Moreover, while "[t]he constitution has expressly invested the executive with power to receive ambassadors, and other ministers [i]t has not expressly invested congress with the power, either to repudiate, or acknowledge them." *Id.* at 359 (emphasis added). Subsequently, while sitting as a Circuit Justice, Justice Story wrote that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognize, from time to time, any new governments, which may arise in the political revolutions of the world...." *Williams v. Suffolk Ins. Co.,* 29 F. Cas. 1402, 1403 (C.C.D.Mass.1838).

permissible exercise of the Congress's "passport power." In its remand to us, the Supreme Court directed that we examine, *inter alia,* the parties' evidence regarding "the nature of ... the passport ... power[ ]." *Id.* at 1430. Neither party has made clear the textual source of the passport power in the Constitution, suggesting that it may come from the Congress's power regarding immigration and foreign commerce. *See, e.g.,* Oral Arg. Tr. *215 48–49 (Zivotofsky's counsel noting "there's no specific power in the Constitution that says passports" and referencing the Congress's authority "over immigration [and] over international commerce"); Br. for Appellee 45 (citing U.S. CONST., art. I, § 8, cls. 3, 4). Nonetheless, it is clear that the Congress has exercised its legislative power to address the subject of passports. It does not, however, have exclusive control over all passport matters. Rather, the Executive branch has long been involved in exercising the passport power, especially if foreign policy is implicated. *See Haig v. Agee,* 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). Until 1856, no passport statute existed and so "the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States." *Id.* at 293, 101 S.Ct. 2766. After the first passport law was enacted in 1856, "[t]he President and the Secretary of State consistently construed the 1856 Act to preserve their authority to withhold passports on national security and foreign policy grounds." *Id.* at 295, 101 S.Ct. 2766. And once the Congress enacted the Passport

Act of 1926, each successive President interpreted the Act to give him the authority to control the issuance of passports for national security or foreign policy reasons: "Indeed, by an unbroken line of Executive Orders, regulations, instructions to consular officials, and notices to passport holders, the President and the Department of State left no doubt that *likelihood of damage to national security or foreign policy of the United States was the single most important criterion in passport decisions.*" *Id.* at 298, 101 S.Ct. 2766 (footnotes omitted and emphasis added); *see also* 16 U.S. Op. Off. Legal Counsel 18, 23 (1992) ("Executive action to control the issuance of passports in connection with foreign affairs has never been seriously questioned.").

[17] Zivotofsky relies on Supreme Court precedent that, he contends, shows the Executive cannot regulate passports unless the Congress has authorized him to do so. In both cases cited, the Court held that the Executive branch acted properly once the Congress had authorized it to so act. *See Haig,* 453 U.S. at 282, 289, 309, 101 S.Ct. 2766 (upholding Executive authority to revoke passport on national security and foreign policy grounds after concluding revocation was authorized by Congress); *Zemel v. Rusk,* 381 U.S. 1, 8, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) (upholding State Department's refusal to validate passport for travel to Cuba because "the Passport Act of 1926 embodie [d] a grant of authority to the Executive" (citation omitted)). But in neither case did the Court state that the Congress's power over passports was exclusive. Indeed, in *Haig,* the Court made clear that

it did *not* decide that issue. *Haig,* 453 U.S. at 289 n. 17, 101 S.Ct. 2766 ("In light of our decision on this issue, we have no occasion in this case to determine the scope of the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress...." (quotation marks omitted)). Likewise, in *Zemel,* the Court in effect rejected the dissenters' statements implying that the Congress exclusively regulates passports. 381 U.S. at 21, 85 S.Ct. 1271 (Black, J., dissenting) ("[R]egulation of passports ... is a law-making—not an executive, law-enforcing—function...."); *id.* at 29, 85 S.Ct. 1271 (Goldberg, J., dissenting) (Executive lacks "an inherent power to prohibit or impede travel by restricting the issuance of passports"). Instead, the *216 Court emphasized that the "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Id.* at 17, 85 S.Ct. 1271.[15] Thus, while the

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[15] Amicus Members of the United States Senate and the United States House of Representatives rely on the holding in *Kent v. Dulles,* 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). In *Kent,* two citizens successfully challenged the Secretary's denial of their passports—on the ground that they refused to state whether they were communists—arguing that, *inter alia,* the denial violated their Fifth Amendment due process right of travel. *Id.* at 117–20, 125, 78 S.Ct. 1113. But *Kent* held, at most, that absent congressional authorization, the State Department could not *deny* a passport if the denial violated a *constitutional* right. *See id.* at 129, 78 S.Ct. 1113 ("If [constitutional] liberty is to be regulated, it must be pursuant to the lawmaking functions of the Congress." (quotation marks omitted)). Here, the State Department has not *denied*

Congress has the power to enact passport legislation, its passport power is not exclusive. And if the Congress legislates pursuant to its non-exclusive passport power in such a way to infringe on Executive authority, the legislation presents a separation of powers problem. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, —— U.S. ——, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (Sarbanes–Oxley Act's dual for-cause limitations on removal of members of financial oversight board unconstitutional on separation of powers ground); *Bowsher v. Synar*, 478 U.S. 714, 769, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) ("[E]ven the results of the constitutional legislative process may be unconstitutional if those results are in fact destructive of the scheme of separation-of-powers.").

[18] The question we must answer, then, is whether section 214(d)—which speaks only to passports—nonetheless interferes with the President's exclusive recognition power. Zivotofsky contends that section 214(d) causes no such

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Zivotofsky a passport nor does Zivotofsky assert the violation of a *constitutional* right. Moreover, the Court itself has not treated *Kent* as if it held that the Executive's regulation of passports is entirely dependent on congressional authorization. *See Haig*, 453 U.S. at 289 n. 17, 101 S.Ct. 2766. For example, in *Zemel*, the Court distinguished *Kent* on the basis that *Kent* had invalidated the State Department's denial "based on the character of the particular applicant." 381 U.S. at 13, 85 S.Ct. 1271. In contrast, the denial that *Zemel* upheld was based on "foreign policy considerations affecting all citizens"—namely, avoiding the danger that travel to Cuba by United States citizens "might involve the Nation in dangerous international incidents." *Id.* at 13, 15, 85 S.Ct. 1271.

interference because of its limited reach, that is, it simply regulates one detail of one limited type of passport. But the President's recognition power "is not limited to a determination of the government to be recognized"; it also "includes the power to determine the policy which is to govern the question of recognition." *Pink,* 315 U.S. at 229, 62 S.Ct. 552. Applying this rule, the *Pink* Court held that New York State policy was superseded by the Litvinov Assignment when the policy—which declined to give effect to claims under the Litvinov Assignment—"collid[ed] with and subtract[ed] from the [President's recognition] policy" by "tend[ing] to restore some of the precise impediments to friendly relations which the President intended to remove" with his recognition policy. *Id.* at 231, 62 S.Ct. 552.

[19][20] With the recognition power overlay, section 214(d) is not, as Zivotofsky asserts, legislation that simply—and neutrally—regulates the form and content of a passport. Instead, as the Secretary explains, it runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem. Since 1948, American presidents *217 have steadfastly declined to recognize any foreign nation's sovereignty over that city. The Executive branch has made clear that the status of Jerusalem must be decided not unilaterally by the United States but in the context of a settlement involving all of the relevant parties. *See supra* p. 200. The State Department FAM implements the Executive branch policy of neutrality by designating how a Jerusalem-born citizen's passport notes his place of birth. For an applicant

like Zivotofsky, who was born in Jerusalem after 1948, the FAM is emphatic: denote the place of birth as "Jerusalem." 7 FAM 1383.5–6 (JA 115); *see also* 7 FAM 1383 Ex. 1383.1 pt. II (JA 127) (stating that "Israel" "[d]oes not include Jerusalem" and that for applicants born in "Jerusalem," "[d]o not write Israel or Jordan"). In his interrogatory responses, the Secretary explained the significance of the FAM's Jerusalem directive: "Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." Def.'s Resps. to Pl.'s Interrogs. at 8–9, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv1921 (D.D.C. June 5, 2006) (JA 58–59). Furthermore, "[t]he Palestinians would view any United States change with respect to Jerusalem as an *endorsement of Israel's claim to Jerusalem* and a rejection of their own." *Id.* at 9 (JA 59) (emphasis added). Thus, "[w]ithin the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that *would recognize, or might be perceived as constituting recognition of,* Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." *Id.* (emphasis added). "[R]eversal of United States policy not to prejudge a central final status issue could provoke uproar

throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." *Id.* at 11 (JA 61). We find the Secretary's detailed explanation of the conflict between section 214(d) and Executive recognition policy compelling, especially given "our customary policy to accord deference to the President in matters of foreign affairs." *Ameziane v. Obama,* 699 F.3d 488, 494 (D.C.Cir.2012) (quotation marks omitted); *see also Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 348, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (noting "our customary policy of deference to the President in matters of foreign affairs" that "may implicate our relations with foreign powers ... requir[ing] consideration of changing political and economic circumstances" (quotation marks omitted)); *Rattigan v. Holder,* 689 F.3d 764, 769 (D.C.Cir.2012) (finding "the government's arguments quite powerful, especially given the deference owed the executive in cases implicating national security" (quotation marks omitted)). By attempting to alter the State Department's treatment of passport applicants born in Jerusalem, section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power.

Our reading of section 214(d) as an attempted legislative articulation of foreign policy is consistent with the Congress' characterization of the legislation. By its own terms, section 214 was enacted to alter United States foreign policy toward

*218 Jerusalem. The title of section 214 is "*United States Policy* with Respect to Jerusalem as the Capital of Israel." Pub.L. No. 107–228 § 214, 116 Stat. at 1365 (emphasis added). Section 214(a) explains that "[t]he Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President ... to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." *Id.* § 214(a), 116 Stat. at 1365–66. The House Conference report accompanying the bill that became the Foreign Relations Authorization Act explained that section 214 "contain[ed] four provisions related to the recognition of Jerusalem as Israel's capital." H.R. Conf. Rep. 107–671 at 123 (Sept. 23, 2002). Various members of the Congress explained that the purpose of section 214(d) was to affect United States policy toward Jerusalem and Israel. *See* 148 CONG. REC. H6,649, H6,649 (daily ed. Sept. 25, 2002) (statement of Rep. Diaz–Balart) ("This legislation requires compliance with [the Jerusalem Embassy Act [16]] that recognizes Jerusalem as the capital of Israel...."); *id.* at H6,653 (statement of Rep. Hyde) ("[The bill] contains provisions to spur compliance with [the Jerusalem Embassy Act] recognizing Jerusalem as the capital of Israel."); *id.* (statement of Rep. Lantos) ("Our bill reaffirms United States policy that Jerusalem is the undivided and eternal capital of the State of Israel."); 148 CONG. REC. S9,401–02, S9,403 (daily

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[16] The Jerusalem Embassy Act is discussed *supra* at pp. 200–01.

ed. Sept. 26, 2002) (statement of Sen. Helms) ("This bill.... recognize[s] the right of Israel to name Jerusalem as its own capit[a]l....").

Moreover, as the Secretary averred earlier in this litigation, the 2002 enactment of section 214 "provoked strong reaction throughout the Middle East, even though the President in his signing statement said that the provision would not be construed as mandatory and assured that 'U.S. policy regarding Jerusalem has not changed.' " Def.'s Resps. to Pl.'s Interrogs. at 9–10, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv–1921 (D.D.C. June 5, 2006) (JA 59–60). For example, various Palestinian groups issued statements asserting that section 214 "undermine[d] the role of the U.S. as a sponsor of the peace process," "undervalu[ed] ... Palestinian, Arab and Islamic rights in Jerusalem" and "rais[ed] questions about the real position of the U.S. Administration vis-à-vis Jerusalem." *Id.* at 10 (JA 60) (quotation marks omitted). As in *Pink,* the Secretary's enforcement of section 214(d) "would collide with and subtract from the [President's] policy" by "help[ing] keep alive one source of friction" between the United States and parties in conflict in the Middle East "which the policy of recognition was designed to eliminate." *Pink,* 315 U.S. at 231–32, 62 S.Ct. 552.[17]

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[17] Unlike in *Pink,* here the legislation that conflicts with the President's recognition power was enacted by the Congress, not a state. But, as we today hold, the President exclusively exercises the recognition power. The Congress, like a state, may not impermissibly intrude on an *exclusive* Executive power. Contrary to Zivotofsky's assertion, then, the fact that

Zivotofsky argues that the Secretary has not suffered—and will not suffer—adverse foreign policy consequences by issuing him a passport that lists his place of birth as Israel. He asserts that the Secretary has admitted that, from time to time, the State Department has inadvertently issued passports with "Israel" as the place of birth to citizens born in Jerusalem and that there is no evidence that the issuance of the *219 passports resulted in harm to the United States's foreign policy interests. Similarly, Zivotofsky cites State Department records that, before revision, referred to "Jerusalem, Israel." Br. for Appellant 14. Likewise, Amicus Zionist Organization of America exhaustively catalogues official United States websites that contained "Jerusalem, Israel" before recent revisions. Zivotofsky further notes that "not a single Palestinian or Arab interest group deemed it important enough to submit an *amicus curiae* brief in the Supreme Court contending that section 214(d) should not be enforced" nor has any such group appeared in our court during this lengthy litigation. Appellant's Reply Br. 3. Zivotofsky also contends that the Secretary's fear of harm is exaggerated because section 214(d)'s passport directive is not unlike its Taiwan directive that allows an applicant born in Taiwan to specify as his birthplace "Taiwan" rather than "China," which directive has been peacefully implemented. Br. for Appellant 54–56.[18]

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the Congress, rather than a state legislature, enacted section 214(d) does not distinguish this case from *Pink*.

[18] FN18. The State Department included "Taiwan" on passports only after determining that doing so was consistent with

Nonetheless, we are not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d). *See, e.g., Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial.... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 529, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988) ("[F]oreign policy [is] the province and responsibility of the Executive.") (quotation marks omitted); *Haig*, 453 U.S. at 292, 101 S.Ct. 2766 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). As the Executive—the "sole organ of the nation in its external relations," *Curtiss–Wright*, 299 U.S. at 319, 57 S.Ct. 216—is the one branch of the federal government before us[19] and both the current Executive branch as well as its predecessor believe that section 214(d) would cause adverse foreign policy consequences (and in fact presented evidence that it had caused foreign policy consequences), that view is conclusive on us. *Cf.*

United States policy that Taiwan is a part of China; by contrast, section 214(d) is inconsistent with the United States's policy of neutrality regarding Jerusalem.

[19] While an amicus brief has been submitted on behalf of six senators and fifty-seven representatives, they of course do not speak for the Congress *qua* the Congress.

United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) ("[T]he courts have traditionally shown the utmost deference to Presidential responsibilities.... involving foreign policy considerations...."). Moreover, Zivotofsky's reliance on the State Department's earlier, incidental references to "Jerusalem, Israel" or inclusion of "Israel" on the passports of United States citizens born in Jerusalem is entirely misplaced. The controversy does not arise because a website or passport at one time included a reference connecting Jerusalem and Israel. Rather, the unconstitutional intrusion results from section 214(d)'s attempted alteration of United States policy to require the State Department to take an *official and intentional action* to include "Israel" on the passport of a United States citizen born in Jerusalem. While the fact that legislation merely touches on a policy relating to recognition does not make it unconstitutional, *220 section 214(d) does not do so; instead the Congress plainly intended to force the State Department to deviate from its decades-long position of neutrality on what nation or government, if any, is sovereign over Jerusalem. Accordingly, we conclude that section 214(d) impermissibly intrudes on the President's recognition power and is therefore unconstitutional.

D. Zivotofsky's Remaining Arguments

Zivotofsky challenges the Secretary's decision declining to enforce section 214(d) on two additional grounds but we find both grounds without merit.

First, Zivotofsky contends that section 214(d)

remedies the State Department's discriminatory policy against supporters of Israel. He notes that an individual born in Tel Aviv or Haifa after 1948 may list as his place of birth either "Israel" or his local birthplace if he objects to including "Israel." *See* 7 FAM 1383.5–4 (JA 114). An individual born in Jerusalem after 1948, as we have discussed, may not choose between a country and a locality; rather, his place of birth must be listed as "Jerusalem." *See* 7 FAM 1383.5–6 (JA 115). Zivotofsky laments that "[n]o matter where in Jerusalem an American citizen may be born ... he or she does not have the option given to American citizens born in Tel Aviv or Haifa to choose whether to record the country or city of birth." Br. for Appellant 57. We do not decide the merits of this contention because Zivotofsky did not make it in district court and it is therefore waived. *See, e.g., Jicarilla Apache Nation v. U.S. Dep't of Interior,* 613 F.3d 1112, 1117 (D.C.Cir.2010).

Second, Zivotofsky argues that President George W. Bush's signing statement—indicating that section 214 is, in his view, unconstitutional—is invalid because he should have instead vetoed the enactment to register his objection. The signing statement is irrelevant. Even if the signing statement were before us and we were somehow to find it wanting, that conclusion would have no effect on the Secretary's enforcement of section 214(d) today.

For the foregoing reasons, we affirm the judgment of the district court dismissing the complaint on the alternative ground that section

214(d) impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him under the Constitution and is therefore unconstitutional.[20]

So ordered.

TATEL, Circuit Judge, concurring:

Although I concur fully in the court's opinion, I write separately to elucidate my thinking about the important and novel separation-of-powers question this case presents. The Secretary's argument that Section 214(d) is unconstitutional turns on two subsidiary arguments: first, that the power to recognize foreign sovereigns belongs to the President alone; and second, that Section 214(d) interferes with the President's exclusive exercise of that power. But I think it best to begin with an issue that underlies and helps frame these recognition power questions, namely, Congress's so-called passport power.

I.

It is beyond dispute that Congress's immigration, foreign commerce, and naturalization powers

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[20] The district court dismissed Zivotofsky's complaint on the ground that it presented a nonjusticiable political question. *Zivotofsky III,* 511 F.Supp.2d at 99. While the district court did not reach the merits, we need not remand because no factual development is necessary to decide the case. *See, e.g., Timbisha Shoshone Tribe v. Salazar,* 678 F.3d 935, 938 (D.C.Cir.2012).

authorize it to regulate passports. *See* Court's Op. at 214–16; Secretary's Br. at 45–46 (acknowledging that "Congress ... has the constitutional authority to generally regulate the form and content of passports in furtherance of its enumerated powers"). Zivotofsky would have us stop there. He reasons that because Congress has the power to regulate passports and because Section 214(d) is passport legislation, the statute is constitutional. This argument, however, overlooks the independent limitations the Constitution imposes even on legislation within Congress's enumerated powers. That is, a statute that Congress would otherwise have authority to enact may still run up against some independent restriction on its power. For example, the Commerce Clause authorizes Congress to regulate interstate communications, but a communications statute may nevertheless run afoul of the First Amendment. *See, e.g., Reno v. ACLU,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (holding that anti-indecency provisions of the Communications Decency Act violated the First Amendment).

The fact that Congress has affirmative authority to regulate passports thus does not resolve the question of whether Section 214(d) comports with the separation of powers. It does, however, help frame the quite narrow constitutional question we must answer. Congress has authority to regulate passports; we need only decide whether this particular exercise of that authority, Section 214(d), infringes on the Executive's recognition power.

II.

As I noted at the outset, in order to demonstrate that Section 214(d) is unconstitutional the Secretary must begin by establishing that the recognition power in fact inheres exclusively in the President. This is because, as the court explains, *see* Court's Op. at 204–05, a President may "take[ ] measures incompatible with the expressed ... will of Congress" only when he acts pursuant to an "exclusive" Executive power. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637–38 & n. 4, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). If the Constitution entrusts the recognition power exclusively to the President, as the Secretary claims, there remains the even more difficult question of whether Section 214(d) intrudes upon his exercise of that power. In resolving both questions, we find ourselves in relatively uncharted waters with few fixed stars by which to navigate.

A.

I have little to add to the court's thorough discussion of whether the Constitution endows the President with exclusive power to recognize foreign sovereigns. As the court details, there is scant constitutional text to guide us and little contemporaneous evidence of the Framers' intent. *See* Court's Op. at 205–07. Moreover, although the court thoroughly recounts the historical precedents each side marshals in support of its position, *see id.* at 207–10, the most striking thing about this retelling is what is absent from it: a situation like this one, where the President and Congress disagree about a recognition question. To be sure, throughout

our history Congress has often acquiesced in a President's unilateral recognition of a foreign sovereign. *See, e.g., id.* at 207–08 (detailing President George Washington's recognition of France's post-revolutionary government). And on a few occasions, a President has voluntarily coordinated with Congress regarding a recognition decision. *222 *See, e.g., id.* at 21–22 (pointing to President Abraham Lincoln's request that Congress endorse his recognition of Liberia and Haiti). But neither party (nor any of the amici) points to any time in our history when the President and Congress have clashed over an issue of recognition.

Given all that, it is unsurprising that the Supreme Court has had no occasion to definitively resolve the political branches' competing claims to recognition power. True, the Court has consistently and clearly stated that *courts* have no authority to second-guess recognition decisions. *See, e.g., Williams v. Suffolk Insurance Co.,* 38 U.S. 415, 420, 13 Pet. 415, 10 L.Ed. 226 (1839). And in so doing, it has often referred to the recognition power as inhering exclusively in the Executive. *See, e.g., Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("Political recognition is exclusively a function of the Executive."). That said, the Court has also occasionally suggested that Congress and the President share that power. *See, e.g. Jones v. United States,* 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890) ("Who is the sovereign ... of a territory, is not a judicial, but a political, question, the determination of which by the legislative and

executive departments ... conclusively binds the judges...."). Significantly for our purposes, the Court has made many more statements falling in the former category than in the latter. But still and again, the Court has never squarely resolved the precise question we face today.

To say that the question has yet to be conclusively answered, however, is not to say—at least from the perspective of this "inferior" court—that the answer is unclear. All told, given the great weight of historical and legal precedent and given that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative," *United States v. Oakar,* 111 F.3d 146, 153 (D.C.Cir.1997) (internal quotation marks omitted), we are compelled to conclude that "[p]olitical recognition is exclusively a function of the Executive," *Sabbatino,* 376 U.S. at 410, 84 S.Ct. 923. Indeed, all three of our colleagues who considered this question the last time this case was before us agreed. *See Zivotofsky v. Secretary of State,* 571 F.3d 1227, 1231 (D.C.Cir.2009), vacated and remanded by *Zivotofsky v. Clinton,* —— U.S. ——, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012); *id.* at 1240 (Edwards, J., concurring). To hold otherwise, we would have to disregard not only their considered views, but also the Supreme Court's repeated statements to the same effect, *see e.g., Goldwater v. Carter,* 444 U.S. 996, 1007, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." (citing *Sabbatino,* 376 U.S. at

410, 84 S.Ct. 923; *Baker v. Carr,* 369 U.S. 186, 212, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *United States v. Pink,* 315 U.S. 203, 228–30, 62 S.Ct. 552, 86 L.Ed. 796 (1942))), as well as centuries of largely consistent historical practice, *see* Court's Op. at 207–10. Moreover, in light of the President's "primary responsibility for the conduct of our foreign affairs," *New York Times Co. v. United States,* 403 U.S. 713, 741, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), locating the recognition power in the Executive branch conforms to our broader constitutional design.

B.

The critical question, then, is whether Section 214(d) in fact infringes on the President's exclusive authority to recognize foreign sovereigns. The Secretary's position is straightforward: By preventing passport holders from identifying a place of birth that conflicts with the President's recognition determinations, the Secretary's place-of-birth policy implicates recognition. This is all the more evident in the context of Jerusalem. As Judge Edwards put it, "The Secretary's rules regarding the designation of Jerusalem on passports ... plainly implement the Executive's determination not to recognize Jerusalem as part of any sovereign regime." *Zivotofsky,* 571 F.3d at 1241–42 (Edwards, J., concurring). Given that the Secretary's place-of-birth policy implicates the recognition power and given that Section 214(d) displaces that policy, the Secretary reasons, the statute unconstitutionally intrudes on the President's recognition power.

Zivotofsky sees things differently. His first and broadest contention is that the President's recognition power, even if exclusive, does not include the power to determine whether certain territory belongs to a particular foreign state. The recognition power may give the President authority to decide whether to recognize a foreign entity as a sovereign, he argues, but it includes no authority to determine that sovereign state's territorial boundaries. This line of argument falls well short of its mark. The power to recognize a sovereign state's territorial boundaries is a necessary corollary to the power to recognize a sovereign in the first place. For instance, recognizing an established sovereign's former colony as a new, independent sovereign seems a straightforward exercise of what even Zivotofsky would concede to be the recognition power. But such recognition necessarily entails a boundary determination—the colony, once formally recognized as part of one sovereign's territory, is effectively recognized as belonging to another. Indeed, precedent binding on this court confirms that the recognition power includes authority to determine territorial boundaries. *See, e.g., Baker,* 369 U.S. at 212, 82 S.Ct. 691 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory...."); *Pink,* 315 U.S. at 229–30, 62 S.Ct. 552 (holding that the recognition power is "not limited to a determination of the government to be recognized," but rather includes the power to take actions without which "the power of recognition might be thwarted"); *Williams,* 38 U.S. at 420 ("[W]hen the executive branch of the government ... assume[s] a fact in regard to the sovereignty of any

island or country, it is conclusive on the judicial department[.]").

Zivotofsky's narrower argument, powerfully developed in amicus briefs submitted by members of Congress and the Anti–Defamation League, is much stronger. Letting Jerusalem-born individuals choose to designate "Israel" as their place of birth, he contends, neither effects a recognition of Israel's sovereignty over Jerusalem nor otherwise interferes with the President's recognition power. As he emphasizes, nothing in Section 214(d) requires the Secretary to list "Israel" as the place of birth for all Jerusalem-born U.S. citizens. Rather, it merely enables those Jerusalem-born citizens who support Israel to choose to designate their place of birth consistently with that view. Aside from the Secretary's say-so, Zivotofsky goes on to argue, there is simply no reason to conclude that the statute's limited interference with the way the Secretary records a passport holder's place of birth implicates the recognition power. Nor is there reason to believe that implementing Section 214(d) would adversely affect foreign policy. Because affected passports would list "Israel"—not "Jerusalem, Israel"—observers would discern no U.S. policy identifying Jerusalem as part of Israel.

What makes this case difficult is that Zivotofsky is partly right. As the Secretary concedes, *see* Secretary's Br. at 53 n. 13, a primary purpose of the place-of-birth field is to enable the government to identify particular individuals—e.g., by distinguishing one Jane Doe from another born the

very same day. And the fact that the Secretary permits individuals to choose to list a city or area of birth instead of a country of birth does tend to suggest that its place-of-birth policy is also about personal identity.

That the Secretary's policy is about identification and personal identity, however, does not mean that it does not also implicate recognition. In fact, it clearly does. Over the years, the Secretary has been incredibly consistent on this point: in no circumstances—including circumstances beyond the Jerusalem issue—can an individual opt for a place-of-birth designation inconsistent with United States recognition policy. *See* 7 FAM 1383.5–1383.7. For example, because the United States never recognized the Soviet Union's annexation of Latvia, Lithuania, and Estonia, the Secretary "did not authorize entry of 'U.S.S.R.' or the 'Soviet Union' as a place of birth" for people born in these areas. 7 FAM 1340 Appx. D. Zivotofsky identifies no deviation from this policy, nor am I aware of one. The Taiwan directive to which Zivotofsky repeatedly points only underscores the Secretary's consistency. Because the United States recognizes Taiwan as an area within China, permitting individuals to list "Taiwan" as their place of birth comports with the Secretary's general policy. Moreover, one cannot possibly read the Foreign Affairs Manual's application of that policy to Jerusalem as anything but an attempt to maintain consistency between the place-of-birth field and the President's decision to recognize no sovereign's claim to that city.

That the Secretary accommodates identity preferences to the extent they are consistent with recognition policy does little to undermine his position that the place-of-birth field in fact implicates recognition. The Secretary has consistently walked a careful line, permitting individual choice where possible while still ensuring consistency with foreign policy. Because the Secretary's policy is about *both* identification and recognition, Congress could probably pass some laws about the place-of-birth field that do not interfere with the recognition power. For instance, Congress might be able to do little things, like require that the place of birth be listed in a particular font. It might even be able to do bigger things, like eliminate the place-of-birth field all together. Although doing so would inhibit identification of passport holders, it would not seem to interfere with the President's recognition power.

But in enacting Section 214(d), Congress did intrude on the recognition power. The statute seeks to abrogate the Secretary's longstanding practice of precluding place-of-birth designations that are inconsistent with U.S. recognition policy. According to the Secretary, Section 214(d) would also have consequences for the President's carefully guarded neutrality on the question of Jerusalem. Although Zivotofsky challenges the President's judgment that adverse foreign policy consequences would flow from implementing Section 214(d), he offers no reason why the President's exercise of his constitutional power to recognize foreign sovereigns should hinge on a showing of adverse consequences. Even more

importantly, courts are not in the business of second-guessing the President's reasonable foreign policy judgments, *cf., e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948), and this one is perfectly reasonable. After all, "[a] passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer." *Haig v. Agee,* 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). And it is certainly plausible, as the Secretary insists, that American-issued passports listing "Israel" as the place of birth for Jerusalem-born citizens could disrupt decades of considered neutrality on the Jerusalem question.

If this were all we had—only the Secretary's reasonable judgment that Section 214(d) infringes on the Executive's exclusive recognition power—it might well be enough. After all, the Supreme Court has held that the recognition power "includes the power to determine the policy which is to govern the question of recognition." *Pink,* 315 U.S. at 229, 62 S.Ct. 552. But there is more. As it turns out, this is not a case in which we must choose between the President's characterization of a statute as implicating recognition and Congress's contrary view. Indeed, Congress was quite candid about what it was doing when it enacted Section 214(d). That subsection is part of a provision titled "United States policy with respect to Jerusalem as the capital of Israel." Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107–228 § 214, 116 Stat. 1365 (2002). The other sections under that heading are not about passports, they are about recognizing

Jerusalem as part of—indeed, as the capital of—Israel. *See id.* And the legislative history makes doubly clear that recognition was Congress's goal. *See* H.R. Conf. Rep. No. 107–671, at 123 (Sept. 23, 2002) (explaining that Section 214 "contains four provisions related to the *recognition* of Jerusalem as Israel's capital" (emphasis added)); *see also* Court's Op. at 217–18 (highlighting similar statements by various members of Congress).

So in the end, this is a separation-of-powers dispute in which both branches involved in the struggle actually agree. Congress intended Section 214(d) to alter recognition policy with respect to Jerusalem, and the President sees it the same way. Our decision makes us the third and final branch to reach this conclusion. And because the recognition power belongs exclusively to the President, that means Section 214(d) is unconstitutional.

III.

Although the foregoing analysis largely resolves this case, there is one loose end I think merits mention: Zivotofsky's argument that the Secretary's place-of-birth policy discriminates against supporters of Israel. In its most effective formulation, I take the point as follows: Under the Secretary's policy, supporters of Palestine born in Tel Aviv can use their passports to signal their rejection of Israel's claim to sovereignty by choosing to list "Tel Aviv" instead of "Israel" as their place of birth. By contrast, supporters of Israel born in Jerusalem cannot use their passports to signal their view that Jerusalem is part of Israel. Thus, the

policy discriminates against Israel supporters, and Section 214(d) remedies that discrimination.

To the extent this is an independent claim that the Secretary's policy is discriminatory, I agree it is waived. *See* Court's Op. at 220. To the extent the argument is that Section 214(d) is constitutional because it remedies unlawful discrimination, such argument cannot overcome the recognition power problem for the same reason the passport power argument cannot: legislation Congress would otherwise have authority to enact may still run afoul of an independent constitutional restraint on congressional action.

I nonetheless think it important to note that the policy is not discriminatory. Indeed, unlike Section 214(d), which permits Jerusalem-born Israel supporters to list "Israel" as their place of birth but allows no parallel option for Jerusalem-born Palestine supporters, the State Department's Foreign Affairs Manual establishes a facially neutral policy that permits individuals to list their city or area of birth in lieu of their country of birth. *See* 7 FAM 1383.5–2; 7 FAM 1383.6(a). The policy applies universally—not just in the context of Jerusalem—and treats Israel and Palestine supporters identically. Jerusalem-born Americans, whether supporters of Israel or supporters of Palestine, may not use their passports to make a political statement. And that is because permitting a Jerusalem-born individual to list "Israel" or "Palestine" would contradict the President's decision to recognize neither entity's sovereignty over

Jerusalem.

True, as Zivotofsky emphasizes with his Tel Aviv example, individuals born within territory the United States has recognized as belonging to Israel can choose either to list "Israel" as their place of birth or instead to list a city or area of birth. Israel supporters may list "Israel," and Palestine supporters may list something more specific. But although the political nature of the latter choice may be clearer insomuch as it marks a deviation from the default country-of-birth rule, that is an unintended consequence of a neutral policy. Indeed, were the United States to recognize the West Bank as the sovereign state of Palestine, the same would be true of Israel supporters born therein. That is, Palestine supporters could list "Palestine," and Israel supporters could make the more obviously political choice to list their city or area of birth. It is only because the United States has not recognized any Palestinian territory that there currently exists no clear analogy to Zivotofsky's Tel Aviv scenario.

APPENDIX B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

October 8, 2013

Mr. Nathan Lewin
Lewin & Lewin, LLP
1775 Eye Street, N.W.
Suite 850
Washington, DC 20006

Re: Menachem Binyamin Zivotofsky, By His parents and Guardians, Ari Z. and Naomi Siegman Zitofofsky
v. John Kerry, Secretary of State
Application No. 13A354

Dear Mr. Lewin:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who, on October 8, 2013 extended the time to and including November 20, 2013.

This letter has been sent to those designated on the attached notification list.

Sincerely,
Scott S. Harris, Clerk
by/Erik Fossum, Case Analyst

APPENDIX C

7 FAM 1380 PASSPORT PREPARATION

*****

7 FAM 1383.1 Transcription and Entry of Passports

a. As a general rule, enter the country of the applicant's birth in the passport. This applies whether the person was born in or outside the United States. See the following sections for more specific information.

b. A birthplace transcription guide covering the United States and other countries and territories is included as 7 FAM 1883 Exhibit 1883.1.

Follow the transcription guide when entering the place of birth in the passport.

*****

7 FAM 1383.2 Persons Born in the United States

*****

7 FAM 1383.3 Naturalized Persons Whose Country of Birth Agrees With Former Nationality

*****

7 FAM 1383.4 Naturalized Persons Whose Country of Birth Differs from Former Nationality

*****

7 FAM 1383.5 Persons Whose Country Is Incorporated Into Another Country

*****

7 FAM 1383.5-4 Palestine

Applicants who were born in the area formally known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place of birth. In such instances the general policy of showing the birthplace as the country having present sovereignty must be explained to the applicant. Consular officers may make exceptions to show Palestine as the birthplace in individual cases upon consideration of all the circumstances, provided the applicant was born before 1948. If the applicant was born in 1948 or thereafter, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty. (See section 7 FAM 1383.6.) For information on that part known as the West Bank, see sections 7 FAM 1383.5-5 and 7 FAM 1383.5-6.

7 FAM 1383.5-5 Israel-Occupied Areas

As a result of prior conflicts and the so-called "June 1967 war," the Government of Israel currently occupies and administers *the Golan Heights, the West Bank, and the Gaza Strip. U.S. policy hold that the Golan Heights is Syrian territory, and that the West Bank and Gaza Strip are territories whose final status must be determined by negotiations.* Generally, the policy is to write the name of the country which retains sovereignty as the place of birth. If the applicant objects, enter the area or city

name as listed in this section. Make clear to the applicant, however, that a foreign official who examines the passport and is unfamiliar with (*or objects to*) the area name may question its appearance in the passport and *possibly deny entry to the bearer.*

Area Name	**Country Name**
Golan Heights	SYRIA
West Bank, Jordan	WEST BANK
Gaza Strip	GAZA STRIP (preferred)
Sinai	EGYPT

NOTE: Do not enter ISRAEL is U.S. passports as the place of birth for applicants born in the occupied territories.

NOTE: The GAZA STRIP area was last part of a sovereign nation when part of Palestine. Therefore, PALESTINE is the alternate acceptable entry provided the applicant was born before 1948.

NOTE: Those persons born before May, 1948 in the area known as the West Bank may prefer to have PALESTINE listed as an alternate entry. Those born in 1948 or later may prefer to have their city of birth as an alternate entry. Persons born in the West Bank in 1948 or later may not have Palestine transcribed as an alternate entry.

7 FAM 1383.5-6 Jerusalem

For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem,

enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

OPPOSITION BRIEF

No. 13-628

In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Pursuant to longstanding policy, the President, through the actions of his Secretary of State, has recognized no state as having sovereignty over the city of Jerusalem, and has instead left this highly sensitive issue to be resolved through negotiations by the foreign parties to that dispute. In order to implement that policy, the Secretary of State lists "Jerusalem" instead of "Israel" as the place of birth in passports, and in consular reports of births abroad, of United States citizens born in that city. In 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, Section 214(d) of which states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. 1366. The question presented is:

Whether Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.

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In the Supreme Court of the United States

No. 13-628

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 725 F.3d 197. Prior opinions of the court of appeals are reported at 571 F.3d 1227 and 444 F.3d 614. The opinion of the district court is reported at 511 F. Supp. 2d 97. The prior opinion of this Court is reported at 132 S. Ct. 1421.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2013. On October 8, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 20, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The status of the city of Jerusalem is one of the most sensitive and longstanding disputes in the Arab-Israeli conflict. For the last 60 years, since President Truman first recognized the state of Israel, the United States' consistent foreign policy has been to recognize no state as having sovereignty over Jerusalem, and to leave that issue to be decided by negotiations between the relevant parties within the peace process.[1] This policy is rooted in the Executive's as-

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[1] See, *e.g.*, 6 U.S. Dep't of State, *Foreign Relations of the United States 1949: The Near East, South Asia, and Africa* 739-741 (1977) (Truman Administration); 13 U.S. Dep't of State, *Foreign Relations of the United States, 1958-1960: Arab-Israeli Dispute; United Arab Republic; North Africa* 147-149 (1992) (Eisenhower Administration); 17 U.S. Dep't of State, *Foreign Relations of the United States 1961-1963: Near East 1961-1962*, at 414-416 (1994) (Kennedy Administration); *U.S. Abstains on U.N. Resolution on Jerusalem; Urges Steps Toward Durable Peace in Near East, Statement by Ambassador Goldberg, reprinted in* 57 *Department of State Bulletin* 148-151 (July 31, 1967) (Johnson Administration); *A Lasting Peace in the Middle East: An American View, Address by Secretary Rogers, reprinted in* 62 *Department of State Bulletin* 7-11 (Jan. 5, 1970) (Nixon Administration); Letters from President Carter to President Anwar Al-Sadat and Prime Minister Begin (Sept. 22, 1978), http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/12020 (Carter Administration); Ronald Reagan, U.S. President, *The Reagan Peace Initiative* (Sept. 1, 1982), http://www.cmep.org/content/reagan-peace-initiative-september-1-1982 (Reagan Administration); Diplomatic Relations, Continuity and Succession of States, *1989-1990 Digest* § 9, at 266 (George H. W. Bush Administration); George W. Bush, U.S. President, *President Bush Calls for New Palestinian Leadership* (June 24, 2002), http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020624-3.html (George W. Bush Administration); Barack Obama, U.S. President, *Remarks by President Obama in Address to the United Nations General Assembly* (Sept. 21, 2011), http://www.whitehouse.gov/the-press-office/

sessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." C.A. J.A. 58-59 (Secretary of State's response to interrogatories); see Letter from George P. Shultz, Sec'y of State, to Hon. Charles H. Percy (Feb. 13, 1984), *reprinted in American Embassy in Israel, Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 13-14 (1984) (Any such action by the United States would "undercut[] and discredit[] our facilitative role in promoting a negotiated settlement," which would be "damaging to the cause of peace and * * * therefore not * * * in the interest of the United States."). For parallel reasons, the Executive does not officially recognize Palestinian claims to current sovereignty in Jerusalem, pending the outcome of these negotiations.

Israeli and Palestinian leaders are currently engaged in such negotiations on a number of key issues, including the future status of Jerusalem, in significant part because of intensive United States diplomatic efforts. These efforts are predicated on the need for the two sides to reach mutually acceptable solutions. See John Kerry, Sec'y of State, *Remarks at Solo Press Availability* (Jan. 5, 2014), http://www.state.gov/secretary/remarks/2014/01/219298.htm ("We're at the table today because of the determination to try to resolve this issue, and both [Israeli Prime Minister

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2011/09/21/remarks-president-obama-address-united-nations-general-assembly (Obama Administration).

Netanyahu and Palestinian Authority President Abbas] have made the tough choices to stay at that table. We are now at a point where the choices narrow down and the choices are obviously real and difficult.").

b. In this highly sensitive context, United States Presidents have maintained a consistent policy of not recognizing any party's sovereignty over Jerusalem and thus not engaging in any official action that would recognize, or might be perceived as constituting recognition of, Jerusalem as a city located within the sovereign territory of Israel. One of the ways the State Department has implemented that policy is in its rules regarding place-of-birth designations in consular reports of birth abroad and passports issued to United States citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the place of birth of a passport applicant is recorded in the passport. See 7 *Foreign Affairs Manual* 1383.1 (1987) (*FAM*).[2] Consistent with the United States' policy of not taking any official act recognizing sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city.[3] 7 *FAM* 1383.5-6, Exh. 1383.1.

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[2] In 2008 and 2010, the State Department revised the *FAM* provisions governing the place-of-birth designation of United States citizens born in "Israel, Jerusalem, and Israeli-occupied [a]reas." See 7 *FAM* 1360, App. D, Birth in Israel, Jerusalem, and Israeli-occupied Areas (2008), http://www.state.gov/documents/org-anization/94675.pdf. These revisions made no change in policy. Unless otherwise noted, this brief cites the 1987 version, which is reproduced in the joint appendix filed in the court of appeals. See C.A. J.A. 376-379.

[3] Similarly, because the United States recognizes no state as having sovereignty over the territories of the West Bank and Gaza,

The State Department's policy concerning the recording of Jerusalem as the place of birth reflects its determination that "U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel." C.A. J.A. 56 (Secretary of State's response to interrogatories). Recording "Israel" as the place of birth of United States citizens born in Jerusalem would be perceived internationally as a "reversal of U.S. policy on Jerusalem's status" dating back to Israel's creation that "would be immediately and publicly known." *Id.* at 61. That reversal could "cause irreversible damage" to the United States' ability to further the peace process. *Id.* at 59.

2. In 2002, Congress passed and the President signed the Foreign Relations Authorization Act, Fiscal Year 2003 (Act), Pub. L. No. 107-228, 116 Stat. 1350. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem. 116 Stat. 1365.

Subsection (a) "urges the President * * * to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." § 214(a), 116 Stat. 1365. Subsection (b) states that none of the funds authorized to be appropriated by the Act may be used to operate the United States consulate in Jerusalem unless that consulate "is under the supervision of the United States Ambassador to Is-

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the State Department's rules mandate recording "West Bank," "Gaza Strip," or the town of birth, in the passports of United States citizens born in those locations. 7 *FAM* 1383.5-5.

rael." § 214(b), 116 Stat. 1365-1366. Subsection (c) states that none of the funds authorized to be appropriated may be used for publication of any "official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel." § 214(c), 116 Stat. 1366. And Subsection (d), on which petitioner relies, states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." § 214(d), 116 Stat. 1366.

At the time of enactment, President Bush stated that if Section 214 were construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers of the Presidents of the United States: George W. Bush 1697, 1698 (Sept. 30, 2002). That signing statement made clear that "U.S. policy regarding Jerusalem has not changed." *Ibid.*

3. Petitioner is a United States citizen born in Jerusalem in 2002. Pet. App. 9a. Petitioner's mother filed an application for a consular report of birth abroad and a United States passport for petitioner, listing his place of birth as "Jerusalem, Israel." *Id.* at 10a & n.3. United States officials informed petitioner's mother that State Department policy required them to record "Jerusalem" as petitioner's place of

birth, which is how petitioner's place of birth appears in the documents he received. *Ibid.*

Petitioner's parents subsequently filed this suit on his behalf against the Secretary of State, seeking an order compelling the State Department to identify petitioner's place of birth as "Israel" in the official documents.[4] Pet. App. 10a.

The district court initially dismissed the complaint on standing and political question grounds. The court of appeals reversed and remanded, concluding that petitioner has standing and that a more complete record was needed on the foreign-policy implications of recording "Israel" as petitioner's place of birth. 444 F.3d 614, 615, 619-620 (2006).

4. a. On remand, the State Department explained, among other things, that in the present circumstances, if "Israel" were to be recorded as the place of birth of a person born in Jerusalem, such "unilateral action" by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians "would critically compromise" the United States' ability to help further the Middle East peace process. C.A. J.A. 58-59, 412. The district court again dismissed on political question grounds. *Id.* at 401-423.

b. The court of appeals affirmed. 571 F.3d 1227, 1233 (2009). The court concluded that petitioner's claim was nonjusticiable "because deciding whether the Secretary of State must mark a passport and Consular Report of Birth as [petitioner] requests would necessarily draw [it] into an area of decisionmaking

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[4] Plaintiff initially requested that his place of birth be recorded as "Jerusalem, Israel," but now requests that his place of birth be recorded as "Israel." 571 F.3d 1227, 1230 (2009).

the Constitution leaves to the Executive alone." *Id.* at 1232-1233. Judge Edwards concurred, explaining that he would have found Section 214(d) unconstitutional because it intrudes on the President's exclusive constitutional authority to recognize foreign states and governments, as well as their territorial boundaries. *Id.* at 1244-1245 (Edwards, J., concurring).

c. This Court granted certiorari, vacated the court of appeals' decision, and remanded for further proceedings. 132 S. Ct. 1421, 1431 (2012). The Court held that petitioner's claim did not present a nonjusticiable political question because petitioner sought to vindicate the statutory right conferred in Section 214(d), and his claim therefore required the courts to determine whether Section 214(d) is constitutional—a "familiar judicial exercise." *Id.* at 1427. Although the Court had requested briefing on the merits question whether Section 214(d) is an unconstitutional intrusion on the Executive Branch's recognition power, it elected not to reach that question, explaining that it was "without the benefit of thorough lower court opinions to guide [its] analysis of the merits." *Id.* at 1430.

5. On remand, the court of appeals held that Section 214(d) impermissibly intrudes on the President's exclusive recognition power. Pet. App. 1a-50a.

The court of appeals first held that the Constitution confers the power to recognize foreign states and governments exclusively on the Executive Branch. The court observed that the Executive has the power to receive ambassadors, U.S. Const. Art. II, § 3, as well as a wide range of foreign-affairs powers, Pet. App. 6a-17a, 35a-36a. Although, in the court's view, the constitutional text and pre-ratification evidence did not conclusively answer the question whether the

President's recognition power was exclusive, *id.* at 16a-20a, the court concluded that "the longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power," *id.* at 20a. The court explained that "[b]eginning with the administration of our first President, George Washington," the Executive Branch had repeatedly acted unilaterally in recognizing foreign entities and in setting the United States' recognition policies. *Id.* at 20a-24a. Congress, moreover, had repeatedly acquiesced in "the President's assertion of exclusive recognition power." *Id.* at 22a-24a. The court further explained that, while petitioner cited "isolated events" in which the President had sought congressional support for recognition decisions, those instances reflected "political prudence" rather than a concession that Congress shared in the recognition power. *Id.* at 24a-26a. Petitioner, the court emphasized, pointed to no occasions on which Congress had itself recognized foreign sovereigns or taken official action contradicting Executive recognition policy. *Id.* at 24a-26a & 26a n.12.

The court of appeals found further support for the exclusivity of the President's recognition power in this Court's repeated declarations in "carefully considered" language, although technically dictum, that "the recognition power lies exclusively with the President." Pet. App. 29a-30a; see *id.* at 30a-34a. The court of appeals reasoned that those statements were consistent with the President's "long recognized" and "presumptive dominance in matters abroad." *Id.* at 28a.

The court of appeals next held that Section 214(d) unconstitutionally impinges on the Executive's exclu-

sive recognition power. Pet. App. 36a-50a. The court first rejected petitioner's argument that Section 214(d) is a valid exercise of Congress's passport authority. The court explained that the Executive has historically exercised authority to determine the form and content of passports, especially as they relate to national security or foreign affairs, and that while Congress also possesses the power to regulate passports pursuant to its enumerated powers, it may not do so in a way that infringes on the Executive's recognition power. *Id.* at 37a-40a. Section 214(d), the court concluded, did just that. Rather than "simply—and neutrally—regulat[ing] the form and content of a passport," *id.* at 41a, the provision's text and structure indicated that it purported to establish "United States policy with respect to Jerusalem as the capital of Israel," *id.* at 44a (quoting Section 214's title) (capitalization altered and italicization omitted). Section 214(d) did so by requiring the Secretary of State, on request, to record "Israel" as the place of birth of a United States citizen born in Jerusalem, *id.* at 48a. That action, the court reasoned, would "signal" that the United States "recognizes" Israel's sovereignty over Jerusalem, *id.* at 42a (quoting C.A. J.A. 58-59), contrary to the Executive Branch's "carefully calibrated and longstanding * * * policy" to refrain from taking a position on that issue, *id.* at 41a. That view, the court held, was confirmed by Congress's own understanding of the purpose and effect of the statute and the strong reactions to Section 214(d)'s enactment in the Middle East region. *Id.* at 43a-45a.

Judge Tatel concurred in the court's opinion, and he also wrote separately to emphasize two primary points. Pet. App. 50a-63a. First, "the great weight of

historical and legal precedent" "compelled" the conclusion that "[p]olitical recognition is exclusively a function of the Executive." *Id.* at 54a (brackets in original). Indeed, Judge Tatel continued, the historical practice of unilateral Executive recognition and congressional acquiescence was unbroken, such that the courts had never before had the occasion to rule on a dispute between the political Branches concerning the recognition power. *Id.* at 53a. Second, the "critical question" was whether Section 214(d) in fact infringed on the President's exclusive recognition power, and in this case both the Executive Branch and Congress agreed that it does. *Id.* at 55a. Because the Executive Branch had "reasonabl[y]" concluded that Section 214(d) interfered with its longstanding recognition policy, and Congress was "quite candid" that it "intended Section 214(d) to alter [that] recognition policy," *id.* at 60a-61a, "this is not a case in which we must choose between the President's characterization of a statute as implicating recognition and Congress's contrary view," *id.* at 60a.

ARGUMENT

The court of appeals correctly held that Section 214(d) impermissibly impinges on the Executive Branch's exclusive constitutional authority to decide whether and on what terms to recognize a foreign sovereign. Further review is not warranted. By holding that Section 214(d) is unconstitutional, after considering the textual, historical, and structural evidence, the court of appeals' decision permits the Executive Branch to continue its longstanding practice of refraining from taking any official action that could constitute, or be interpreted as, recognition of any foreign government's sovereignty over Jerusalem.

Although the court below invalidated Section 214(d), the decision differs from typical cases in which a federal statute has been held unconstitutional, in that its effect is to permit the Executive Branch to maintain the status quo, both with respect to recognition generally and the status of Jerusalem in particular. That result avoids the grave foreign-relations and national-security consequences that would have resulted from a decision in petitioner's favor, while affecting only the very small number of people who could otherwise have availed themselves of the option offered by Section 214(d). The court of appeals' decision is also consistent with this Court's repeated statements and the unanimous view of the courts of appeals to have considered the question. Because Section 214(d) represents an aberrational dispute between the political Branches over recognition policy—petitioners cite, and we are aware of, no similar statutes—the dispute is unlikely to recur with any frequency. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the Constitution grants the President the exclusive authority to recognize foreign sovereigns and their territorial boundaries. Centuries-long Executive Branch practice and congressional acquiescence in that practice, as well as repeated statements in this Court's decisions, confirm that the Executive possesses the exclusive recognition power.

a. The Constitution distributes the powers of the National Government over external affairs between the Executive and the Legislative Branches, but "in foreign affairs the President has a degree of independent authority to act." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003). The Constitu-

tion provides that the two Branches exercise some foreign-affairs powers jointly. For example, the Constitution grants the President the power to make treaties, subject to the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. The Constitution assigns other such powers to Congress, including the power to regulate foreign commerce and the value of foreign currency. *Id.* Art. I, § 8, Cls. 3, 5.

The Constitution assigns a broad range of foreign-affairs powers, however, to the President alone. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1. "[T]he historical gloss on the executive Power * * * has recognized the President's vast share of responsibility for the conduct of our foreign relations." *Garamendi*, 539 U.S. at 414 (internal quotation marks omitted). In particular, the President has "plenary and exclusive power * * * as the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). In addition, and of particular relevance to this case, the Constitution assigns to the President alone the authority to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3 (Receive Ambassadors Clause). That power necessarily includes the authority to decide which ambassadors the President will receive—and therefore which foreign sovereigns to recognize. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410-411 (1964); *United States* v. *Pink*, 315 U.S. 203, 229 (1942). As Alexander Hamilton explained, the reception power "includes th[e power] of judging, in the case of a Revolution of Government in a foreign Coun-

try, whether the new rulers are competent organs of the National Will and ought to be recognised or not."[5] Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* Alexander Hamilton & James Madison, *The Pacificus-Helvidius Debates of 1793-1794 Toward the Completion of the American Founding* 8, 12 (Morton J. Frisch ed., 2007) (brackets in original omitted).

b. From the Washington Administration to the present, the Executive Branch has asserted sole authority to determine whether to recognize foreign states and governments, as well as their territorial boundaries, and Congress has acquiesced in that understanding. That unbroken historical practice "give[s] meaning to the Constitution" because it reflects the settled understanding of the contours of the separation of powers under the Constitution from the very outset. *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (quotation marks omitted).

The Executive Branch routinely has unilaterally recognized foreign states and governments, as well as their sovereign boundaries. President Washington and his cabinet unanimously decided that the President could receive the post-revolution French ambassador, thereby conferring recognition on the new French government, without first consulting Congress. See *George Washington to the Cabinet*, *reprinted in* 25 *The Papers of Thomas Jefferson* 568-569 (John Catanzariti ed., 1992). In 1824, after consulting with his cabinet, President Monroe determined that

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[5] Hamilton initially viewed the Receive Ambassadors Clause as "without consequence in the administration of the government," The Federalist No. 69, at 352 (Hamilton) (Garry Wills ed., 1982), but he came to understand the Clause differently during the Washington Administration.

"no message to Congress would be necessary" before the President recognized Brazil, because "the power of recognizing foreign Governments was necessarily implied in that of receiving Ambassadors and public Ministers." 6 *Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1795 to 1848*, at 329, 348, 358-359 (Charles Francis Adams ed., 1875); see *James Monroe to the Members of the Cabinet* (Oct. 25 & 30, 1817), *reprinted in* 6 *The Writings of James Monroe* 31 (Stanislaus Murray Hamilton ed., 1902). Throughout the nineteenth and twentieth centuries, Presidents continued to exercise the recognition power unilaterally. See, *e.g.*, 1 *Digest of Int'l Law* §§ 35-51, at 195-318 (Green Haywood Hackworth ed., 1940) (Hackworth) (listing numerous twentieth-century examples); Senator Hale, *Memorandum upon Power to Recognize Independence of a New Foreign State*, 29 Cong. Rec. 663, 672 (1897) (*Hale Memorandum*) (noting that the Executive had repeatedly recognized foreign states and governments without congressional objection). That practice continues today. Contemporary examples include the Executive Branch's January 2013 recognition of the Government of Somalia, its July 2011 recognition of the Transitional National Council as the "the 'legitimate governing authority' in Libya," and its July 2011 recognition of the state of South Sudan.[6] See U.S. Dep't of State,

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[6] Contrary to the argument of the amici Members of Congress, Br. 12 n.4, Congress did not itself "act[] to shape recognition policy" in regard to Libya's Transitional National Council (TNC). The primary measure on which amici rely—a proposed Senate resolution that was never passed by the Senate—simply "call[ed] on the President" to recognize the TNC. S. Res. 102 § 5(A), 112th Cong. (2011), http://beta.congress.gov/bill/112th/senate-resolution/

Hillary Rodham Clinton, Sec'y of State, *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting* (Jan. 17, 2013), http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm; Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, *2011 Digest* § 9, at 276 (Libya); *id.* at 272, 274 (South Sudan).

Over the course of centuries of unilateral Executive Branch recognition decisions, Congress has acquiesced in the "prerogative" of the President to recognize foreign states "solely on his own responsibility." 1 Hackworth § 31, at 162; see *Hale Memorandum*, 29 Cong. Rec. at 672 ("The number of instances in which the Executive has recognized a new foreign power without consulting Congress * * * has been very great. No objection has been made by Congress in any of these instances. The legislative power has thus for one hundred years impliedly confirmed the view that the right to recognize a new foreign government belonged to the Executive.").

On a few occasions, Members of Congress have proposed legislation that would have created a role for the Legislative Branch in the recognition of foreign states and governments. But the Executive Branch

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102/text. The other measures referred to by amici in regard to both Libya and Syria were never enacted by Congress and similarly did not mandate recognition contrary to the President's policies. See S. 2152, 112th Cong. (2012), https://www.govtrack.us/congress/bills/112/s2152/text (calling for a report assessing the ability of certain groups "to serve as part of a recognized transitional government" in Syria); H.R. Res. 188, 112th Cong. (2011), https://www.govtrack.us/congress/bills/112/hres188/text (expressing "the sense of the House of Representatives that * * * the regime of Mu'ammar al-Qadhaffi is no longer the legitimate government of Libya").

opposed the bills, and the legislation was either rejected in Congress as an inappropriate incursion into the Executive Branch's constitutional authority or modified to address those concerns. For instance, beginning in 1817, Speaker of the House Henry Clay sought to have Congress recognize the independence from Spain of certain South American provinces, but his efforts were successfully opposed by other Members of Congress and the Monroe Administration, all of whom argued that the recognition power belonged solely to the Executive. See, *e.g.*, Pet. App. 21a-24a (describing this example along with similar occurrences during the nineteenth and twentieth centuries). The President has also occasionally consulted with Congress regarding recognition, but those voluntary undertakings did not suggest that Congress possessed any authority to recognize foreign governments on its own. See *id.* at 25a-26a & 26a n.12 (describing examples).

Thus, as the court of appeals observed, petitioner has been unable to point to a single example, over centuries of Executive Branch recognition of foreign states, in which Congress has taken action in contravention of the Executive's recognition prerogative—until the enactment of Section 214(d).[7] See Pet. App. 24a-27a; *id.* at 52a-53a (Tatel, J., concurring).

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[7] Petitioner now asserts (Pet. 15-16) that a recent law review article has unearthed "two instances" not considered by the court of appeals in which "early Congresses exercised the recognition power." See Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 15-18, 42-50 (2013). Those isolated examples, concerning French sovereignty over St. Domingue, are inapposite. In each case, Congress took actions that were consistent with the President's existing recognition policies. See, *e.g.*, John Adams, *A Proclamation* (June 26, 1799), *reprinted in* 1

c. Although this Court has never had occasion to adjudicate the constitutionality of a statute that impinges on the President's recognition power because Congress has historically acquiesced in the President's exercise of that authority, the Court and individual Justices have repeatedly stated that the Constitution assigns to the President alone the power to make recognition decisions. See Pet. App. 28a-35a.

In 1817, Chief Justice Marshall, sitting as Circuit Justice, held that a criminal jury could not consider whether the defendant acted on behalf of the government of Buenos Ayres, because "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its

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A Compilation of the Messages and Papers of the Presidents 278-279 (James D. Richardson ed., 1897); Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 Am. J. Legal Hist. 141, 205-210 (2013) (discussing Jefferson Administration's tacit agreement with 1806 statute regarding French sovereignty over St. Domingue, which was consistent with its policies).

In addition, contrary to petitioner's contention, the court of appeals correctly concluded that Congress did not independently recognize Haiti and Liberia in 1862, but instead acted at President Lincoln's request. Pet. App. 26a; see Cong. Globe, 37th Cong., 2d Sess. 1773; see also Act of June 5, 1862, ch. 96, 12 Stat. 421. The court of appeals also correctly held that Congress, in accord with the President's views, refrained from recognizing any government in Cuba in 1898, and instead passed a resolution that expressed the views that Spain should withdraw its forces from Cuba and that the "people" of Cuba are independent. Pet. App. 24a-25a; see Act of Apr. 20, 1898, ch. 24, 30 Stat. 738-739. Finally, far from altering the President's recognition decision, the core elements of the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14, implemented policies articulated in President Carter's Memorandum of December 30, 1978. See 44 Fed. Reg. 1075.

independence." *United States* v. *Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va.). Similarly, Justice Story observed that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments." *Williams* v. *Suffolk Ins. Co.*, 29 F. Cas. 1402, 1404 (C.C.D. Mass. 1838), aff'd 38 U.S. (13 Pet.) 415, 420 (1839). Justice Story also explained that the recognition power includes the authority to recognize a state's territorial sovereignty over a particular area. *Ibid.*

This Court addressed the President's sole recognition power in a series of cases arising out of the President's recognition of the Soviet Union. See *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463 (1936); *United States* v. *Belmont*, 301 U.S. 324 (1937); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938); *Pink*, 315 U.S. 203. The Court "accept[ed] as conclusive * * * the determination of our own State Department" as to what government represents "the Russian State," *Guaranty Trust*, 304 U.S. at 138, and stated that "[w]e would usurp the executive function if we held that [the recognition] decision was not final and conclusive in the courts," *Pink*, 315 U.S. at 230.

Since that time, this Court and all of the courts of appeals to address the issue have repeatedly reaffirmed that the recognition power is exclusively vested in the Executive.[8] See, *e.g.*, *National City Bank* v.

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[8] Amici Members of Congress assert (Br. 8) that in certain early cases explaining that the judiciary lacks power to set recognition policy, this Court occasionally spoke in terms of the "*legislative and executive departments*" or the "political departments." See *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 643 (1818)); see

Republic of China, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."); *Sabbatino*, 376 U.S. at 410 ("Political recognition [of a foreign government] is exclusively a function of the Executive."); *Baker* v. *Carr*, 369 U.S. 186, 212 (1962); *United States* v. *Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment); see also *Goldwater* v. *Carter*, 617 F.2d 697, 707-708 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979); *American Int'l Grp., Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 438 (D.C. Cir. 1981); *Can* v. *United States*, 14 F.3d 160, 163 (2d Cir. 1994).

2. The court of appeals also correctly concluded that Section 214(d) impermissibly infringes the President's exclusive recognition power.

a. As the court of appeals recognized, Pet. App. 41a-42a, the State Department's decision to record "Jerusalem," not "Israel," as the place of birth in passports and consular documents is an exercise of the recognition power.[9] A passport is an instrument of

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also *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). As the court of appeals explained, however, when this Court "has discussed the recognition power with more specificity, * * * it has not merely stated that the judiciary lacks authority to decide the issue but instead has explained that the President has the *exclusive* authority." Pet. App. 34a. The other decision on which amici rely concerned the status of territories controlled or acquired by the United States, a matter over which Congress has authority under Article IV of the Constitution. See *Jones* v. *United States*, 137 U.S. 202, 212 (1890); see also U.S. Const. Art. IV, § 3, Cl. 2 (power to legislate regarding "the Territory or other Property belonging to the United States").

[9] The issuance of reports of birth abroad is not an exercise of the President's power with respect to passports. The designation of

diplomacy "addressed to foreign powers." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (quoting *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835)); see *United States* v. *Laub*, 385 U.S. 475, 481 (1967). The Executive Branch accordingly has authority, rooted in its constitutional power over foreign affairs and national security and independent of any congressional authorization, to issue and determine the content of passports. Pet. App. 38a-40a; *Agee*, 453 U.S. at 294 & n.27 (explaining that the Executive issued passports from the time of the Founding, without any statutory authorization to do so). And because a passport is an official instrument of diplomacy, the Executive has sole authority to determine the content of passports insofar as it pertains to the Executive's recognition decisions.

The decision as to *how* to describe a passport holder's place of birth—*i.e.*, to list a particular country name, or to designate a city as being within a particular country—is such an exercise of the recognition power. That is because the manner of describing the place of birth represents an official statement, addressed to foreign Nations through the diplomatic instrument of the passport, of whether the United States recognizes a state's sovereignty over a specific area. The "power to recognize a sovereign state's territorial boundaries is a necessary corollary to the power to recognize a sovereign in the first place," Pet. App. 56a (Tatel, J., concurring), and recognition of territorial boundaries can entail significant foreign-relations consequences. Accordingly, the Secretary's

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place of birth on a consular report of birth abroad is, however, an implementation of the President's recognition power insofar as it identifies a foreign state having sovereignty over that place.

passport regulations are designed to ensure that place-of-birth designations on passports in all cases accurately reflect the United States' positions on recognition and borders. 7 *FAM* 1330, App. D, Current Sovereignty Rule (a) (2008). Although the "general rule" is to list the country of the applicant's birth in passports, 7 *FAM* 1383.1, the State Department's policy is to refrain from listing a country whose sovereignty over the relevant territory the United States does not recognize, see 7 *FAM* 1383.5-1, -2.

The State Department's policy to list "Jerusalem" as the place of birth in passports and on consular reports of birth abroad is thus a specific—and particularly sensitive—application of the Executive's foreign policy and recognition decisions. The State Department has determined that "U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel * * * in the context of listing Israel as the place of birth for individuals born in Jerusalem, when issuing U.S. passports or Consular Reports of Birth Abroad, which are official statements of the U.S. Government." C.A. J.A. 56.

Because the listing of place of birth on passports is an exercise of the recognition power, Congress may not contravene the Executive's place-of-birth determinations. To be sure, Congress has constitutional authority to regulate passports in furtherance of its enumerated powers, such as its powers to regulate foreign commerce and immigration. U.S. Const. Art. I, § 8, Cls. 3, 4, 18. But because Congress's power to regulate passports is not exclusive, and the Executive

is the "sole organ" of the Nation in foreign affairs, *Curtiss-Wright*, 299 U.S. at 319, Congress may not regulate passports in a manner that infringes the Executive Branch's exclusive recognition authority, Pet. App. 40a; see *Agee*, 453 U.S. at 292-295.

But that is precisely what Section 214(d) purports to do: the section containing this provision expressly states that its purpose is to establish "United States policy with respect to Jerusalem as the capital of Israel," § 214, 116 Stat. 1365 (capitalization altered), and it directs the Secretary to permit United States citizens born in Jerusalem to have "Israel" listed as their place of birth, § 214(d), 116 Stat. 1366. As the court of appeals observed, there can be no question that Section 214, in purpose and effect, purports to alter the President's longstanding policy of not recognizing any party's sovereignty over Jerusalem. See Pet. App. 43a-44a (citing text and purpose); *id.* at 60a-61a. Section 214(d) thus impermissibly purports to override the Executive Branch's decades-long policy of neutrality with respect to sovereignty over Jerusalem.[10]

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[10] Contrary to the arguments of amici Members of Congress (Br. 1-3, 15-16), review is not warranted on the ground that the court of appeals' decision gives the Executive unreviewable, "unchecked power" to "ignore any duly enacted Act of Congress" that the Executive views as falling within its recognition power. *Id.* at 16. As this case demonstrates, the Executive's decision not to enforce a statute conferring an enforceable right on the ground that it unconstitutionally impinges on the recognition power is subject to judicial review. 132 S. Ct. at 1427-1428; Pet. App. 14a. The court of appeals held that Section 214(d) is unconstitutional only after concluding that the statute intrudes on the Executive's recognition power. Pet. App. 49a-50a.

Nor did the court of appeals suggest that the Executive's determination that a matter falls within the scope of the recognition

3. Further review is unwarranted. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. The decision below is consistent with this Court's repeated statements that the recognition power belongs to the Executive alone, as well as similar statements by every court of appeals to consider the issue. See pp. 18-20, *supra*. It is also consistent with the "textual, structural, and historical evidence * * * regarding the nature of the statute and of the passport and recognition powers." 132 S. Ct. at 1430.

Although the court of appeals held that Section 214(d) is unconstitutional, the decision differs from typical decisions invalidating a federal statute. The decision below enables the Executive Branch to maintain its current, longstanding practice of refraining from taking any official action that recognizes any

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power is unreviewable. But cf. Amicus Br. 16. As the court observed, Section 214(d) indisputably impinges on the core of the Executive's recognition power because it expressly purports to alter the President's recognition policy by identifying Jerusalem as a part of the state of Israel. See § 214, 116 Stat. 1365 (entitling the statutory section containing Section 214(d), "United States Policy with Respect to Jerusalem as the Capital of Israel"); see also Pet. App. 43a-44a; *id.* at 60a-61a (Tatel, J., concurring) (noting that Congress was "quite candid" about its intentions, and the Executive Branch was "reasonable" in concluding that Section 214(d) interfered with its recognition policy regarding Jerusalem). This case therefore does not present a situation in which the Branches disagree on whether a statute implicates the recognition power. *Id.* at 61a. If a case were to arise that presented a closer question whether the legislation at issue intruded into an area encompassed by the Executive's recognition power, the courts could address in that case how to determine the scope of the recognition power and the appropriate degree of deference due to the Executive Branch in deciding that question.

government's sovereignty over Jerusalem, and it maintains more generally the historical practice under the Constitution with respect to recognition of foreign states, governments, and territorial boundaries. A contrary decision—one that upheld Section 214(d), permitting Congress to override the Executive's judgment in an extraordinarily sensitive context—would have "significantly harmed" United States foreign policy and national security interests and risked "caus[ing] irreversible damage" to the United States' ability to further the peace process in the Middle East. C.A. J.A. 56, 59. At the same time, only a limited number of people—those United States citizens born in Jerusalem who might wish the Secretary to record their place of birth as Israel rather than Jerusalem—may be affected by Section 214(d)'s invalidation.

Review is unwarranted for the additional reason that the disagreement between Congress and the Executive Branch over the substance of a recognition decision that gave rise to this case is a historical aberration that is unlikely to recur. As Judge Tatel observed, "the most striking thing about [the historical evidence] is what is absent from it: a situation like this one, where the President and Congress disagree about a recognition question." Pet. App. 52a. Petitioner has not cited, and the United States is not aware of, any other statute that, like Section 214, purports to alter or supersede any Executive Branch decision to recognize a foreign sovereign within certain territorial boundaries. Before and after Section 214(d)'s enactment, moreover, the Executive Branch has consistently acted unilaterally to recognize foreign states and governments, including with respect to

territorial borders, and Congress has not opposed those decisions. See pp. 14-17, *supra*; see also, *e.g.*, Diplomatic Relations, Succession and Continuity of States, *2004 Digest* § 9, at 451-452 (recognition of independent Iraqi government); Diplomatic Relations, Succession and Continuity of States, *2002 Digest* § 9, at 463-464 (recognition of state of East Timor on the day it declared independence); Diplomatic Relations, Succession and Continuity of States, *1991-1999 Digest* § 9, at 1145-1147 (recognizing Bosnia-Herzegovina, Croatia, and Slovenia, and "accept[ing] the pre-crisis republic borders as the[ir] legitimate international borders"). There is therefore no pressing need for this Court to resolve the questions presented by this case at this time, particularly in light of the uniquely sensitive foreign-relations context in which this unusual dispute has arisen.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

RECORD AND BRIEFS

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In The
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MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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INTRODUCTION

The Solicitor General's Brief in Opposition fails to cite even a single instance in which this Court has declined to review a federal court of appeals decision that invalidated a federal statute as unconstitutional. Respect for a deliberate Congressional determination enacted into positive law demands that the final word on the legitimacy of Congress' action not be a lower-court decision repudiating Congress' constitutional authority. If an intermediate appellate court condemns Congress' legislative directive as beyond Congress' constitutional authority, review by this Court is warranted because of "the obvious importance of the case." Shapiro, Geller, Bishop, Hartnett & Himmelfarb, *Supreme Court Practice* § 4.12, p. 264 (10th ed. 2013). The final judicial word should, in such circumstances, come from this Court and not from three judges who describe themselves as "an inferior court." Pet. App. 30a; see also Pet. App. 54a (Tatel, J., concurring) ("the perspective of this 'inferior' court").

Indeed, Solicitor General Verrilli urged this Court in his Petition for a Writ of Certiorari in *United States Department of Health and Human Services v. Commonwealth of Massachusetts*, No. 12-15, to review a court of appeals decision invalidating the Defense of Marriage Act even though the Executive Branch agreed with the lower court that the law was unconstitutional. The Solicitor General's reason – fully applicable to the present case – was, "This Court's Review Is Warranted Because the Court of

Appeals Invalidated an Act of Congress." *Id.* at pp. 15-16.

The government asserts in its Opposition that this case differs from "typical cases" in which this Court has reviewed lower-court nullifications of federal laws on constitutional grounds. The government's Opposition briefly proffers two possible reasons why the consistent precedent that the Supreme Court will review any constitutional invalidation of an Act of Congress should not be followed in this case. The government asserts that in this case (a) the effect of the court of appeals' decision is "to maintain the status quo" and (b) the decision affects "only the very small number of people" who could invoke the right granted by the invalidated federal law. Br. in Opp., pp. 12, 24-25. If the Solicitor General's assertions that this case is atypical were correct, other cases in which this Court has agreed to review rulings of federal courts of appeals invalidating federal statutes on constitutional grounds should not involve (a) lower-court rulings that maintained a status quo and (b) federal laws that affected "smaller numbers of people" than does Section 214(d). In fact, as we demonstrate below (pp. 4-10, *infra*), both asserted grounds of distinction are refuted by a review of this Court's precedents.

The Brief in Opposition also misstates the historical record in arguing that the President has always claimed and exercised "sole authority" to recognize foreign governments. A fair and complete reading of American history regarding the authority to recognize foreign governments establishes,

contrary to the conclusion of the court below and the Solicitor General's assertions, that it has always been a power shared by Congress and the Executive. Presidents from the earliest days of the Republic into the Twentieth Century have acknowledged Congress' role – and occasional leadership – in this arena.

The importance of the Question Presented is demonstrated by this Court's *sua sponte* decision, when this case first came before it, to direct the parties to brief and argue the constitutional issue. In its remand to the court of appeals, this Court used language that implied that this Court would re-visit that question after the lower court issued its decision. There is explicit and square disagreement between the Executive and the Congress over a recognition issue – a legal question that this Court has never heretofore directly addressed.

The Court should not be swayed by the government's effort – repeatedly made at each stage of this litigation – to intimidate the judiciary by emphasizing the "sensitivity" of Jerusalem's status. This case will not determine United States policy regarding Jerusalem, which can be definitively declared by the Executive regardless of how birth in Jerusalem is treated in United States passports. The effect of a ruling sustaining the constitutionality of Section 214(d) has been greatly exaggerated by the State Department ever since the law was enacted. It does not justify a refusal to review a lower-court decision that presents a substantial separation-of-powers issue affects foreign policy judgments on which Congress and the President disagree, and

repudiates a considered Congressional policy that was duly enacted into law.

ARGUMENT

I.

THIS COURT ROUTINELY REVIEWS LOWER-COURT RULINGS THAT MAINTAIN THE STATUS QUO WHEN INVALIDATING A FEDERAL LAW AS UNCONSTITUTIONAL

There is no principled reason to distinguish, for purposes of this Court's discretionary review of lower-court findings of unconstitutionality, between lower-court rulings that alter the status quo and those that maintain it. No decision of this Court and, to our knowledge, no authority or commentator on the Court's practices and procedures has ever stated or implied that this is a distinction that should make a difference in a case in which the constitutionality of an Act of Congress is challenged.

Indeed, this Court's precedents demonstrate that, in ***nearly all*** instances that this Court has reviewed a ruling of a federal court of appeals that found a federal statute to be unconstitutional, the effect of the reviewed lower-court decision has been to maintain the status quo.

(1) In *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013), the Fifth Circuit invalidated, on constitutional grounds, a federal law ("SORNA") that required federal sex offenders to register in the States where they live, study, and work. *United*

States v. Kebodeaux, 687 F.3d 232 (5th Cir. 2012) (en banc). This Court agreed to hear and decide the government's appeal from that decision even though the effect of the Fifth Circuit's ruling was to maintain the legal status quo under which such registration was not required.

(2) In *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002), the Third Circuit affirmed a preliminary injunction and ruled that the standard prescribed by federal statute ("COPA") in prohibiting sexually explicit materials on the Internet to protect minors violated the First Amendment. *American Civil Liberties Union v. Reno*, 217 F.3d 162 (3d Cir. 2000). COPA had never been enforced prior to institution of the lawsuit. Hence the preliminary injunction issued by the district court on constitutional grounds and affirmed by the court of appeals maintained the status quo. No party or *amicus curiae* thought that this consideration was relevant in any manner in determining whether this Court should grant the government's petition for a writ of certiorari.

(3) In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Ninth Circuit invalidated, on constitutional grounds, a federal statute that directed the forfeiture of the full amount of cash that an accused carried with him in violation of a statutory $10,000 maximum when he left the United States. *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996). The court of appeals' conclusion that the law was unconstitutional retained the status quo as it had existed prior to enactment of the law. No forfeiture of any amount had been authorized before

the law was enacted in 1985, and it does not appear from the Court's opinion that there had been any federal law-enforcement practice following enactment of the forfeiture provision that was disrupted by the Ninth Circuit's ruling.

(4) In *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996), the Federal Circuit invalidated, under the Constitution's Export Clause, generally applicable, nondiscriminatory federal taxes on goods in export transit. *International Business Machines Corp. v. United States*, 59 F.3d 1234 (Fed Cir. 1995). The basis for the ruling was a 1915 decision of this Court (*Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915)) that the government sought to have overruled. 517 U.S. at 850. The Federal Circuit decision that applied the 80-year-old *Thames & Mersey* precedent in invaliding the tax was plainly a ruling that maintained the status quo. This Court granted certiorari to determine the constitutional status of the law even though the Federal Circuit decision had maintained the status quo.

(5) In *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Fourth Circuit invalidated on First Amendment grounds a federal law that prohibited broadcasting radio advertisements for lotteries into States where lotteries are illegal. *Edge Broadcasting Co. v. United States*, 956 F.2d 263 (4th Cir. 1992). The Fourth Circuit's holding effectively retained the *status quo ante* under which, pursuant to a 1975 law (509 U.S. at 422-423), such broadcasts were permitted so long as lotteries were legal in the broadcaster's home state. No one apparently

believed that maintenance of the status quo was relevant to whether this Court would or would not review the Fourth Circuit's decision.

Examination of all decisions of this Court that have reviewed judgments of federal courts of appeals that invalidated Acts of Congress would, we believe, establish beyond doubt that maintenance of the status quo is totally irrelevant in deciding whether this Court should grant certiorari.

II.

THIS COURT HAS REVIEWED FEDERAL APPELLATE COURT DECISIONS THAT INVALIDATED FEDERAL LAWS AFFECTING MANY FEWER PEOPLE THAN THE 52,569 PEOPLE AFFECTED BY SECTION 214(d)

In Answers to Interrogatories, the Department of State acknowledged that in 2006 there were 52,569 United States passports outstanding that designated the passport-holder's place of birth as "Jerusalem." J.A. 48. Section 214(d) authorizes each of these American passport-holders born in Jerusalem to choose "Israel" as the place of birth shown in their passports.

If the 52,569 American citizens affected by Section 214(d) comprise too "small" a "number of people" to warrant review of the appellate decision invalidating Section 214(d), why did this Court grant certiorari in *United States v. Bajakajian*, 524 U.S. 321 (1998), which concerned a federal law that affected only individuals who leave the United

States carrying more than $10,000 in currency? Surely the number of international travelers who could be expected to violate a statutory $10,000 limitation on the export of currency is less than 52,569.

Many determinations by this Court to review lower-court rulings have concerned issues that affect far fewer than 52,569 individuals. This Court reviewed "important questions about the balance of powers in our constitutional structure" in *Hamdan v. Rumsfeld*, 548 U.S. 557, 566-567 (2006), which concerned one foreign national incarcerated at Guantanamo. A "narrow" question concerning 652 foreign nationals incarcerated at Guantanamo was heard and decided in *Rasul v. Bush*, 542 U.S. 466, 470-471 (2004). Although the Court observed that "[o]nly three sitting Presidents had been defendants in civil litigation involving their actions prior to taking office" and the respondent had argued that the case was "one-of-a-kind [and] . . . singularly inappropriate for the exercise" of the Court's discretionary jurisdiction, the Court granted certiorari in *Clinton v. Jones*, 520 U.S. 681, 690, 692 (1997).

In Christopher *v. Harbury*, 536 U.S. 403 (2002), the Court granted certiorari due to the "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs." 536 U.S. at 412. The issue concerned a single individual and the government's liability to her for deceptive statements made to her regarding her deceased husband. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252

(1991), the Court determined the constitutionality of an "unusual statutory condition." It held that the statutory provision violated the constitutional principle of separation of powers while observing that violation of separation-of-powers principles "have been uncommon." 501 U.S. at 255.

This line of precedents establishes that denial of certiorari in this case cannot be justified because Section 214(d) affects only 52,596 individuals or because the statute is unusual.

III.

THIS COURT'S 2011 DIRECTIVE THAT THE QUESTION PRESENTED BE BRIEFED, AS WELL AS THE TERMS OF THIS COURT'S 2012 REMAND, ESTABLISH THAT THE ISSUE IS IMPORTANT AND THAT IT IS NOT A "HISTORICAL ABERRATION"

The government belittles the constitutional issue presented in this case by calling it an "aberrational dispute" and a "historical aberration that is unlikely to recur" (Br. In Opp., pp. 12, 25). This Court has, however, already indicated that it does not share this demeaning perspective. It deemed the constitutional issue significant enough to issue a *sua sponte* order directing the parties to brief and argue "[w]hether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns." *Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011).

This Court included in the majority opinion of March 26, 2012, a lengthy summary of the "detailed legal arguments regarding whether § 214(d) is constitutional in light of powers committed to the Executive, and whether Congress's own powers with respect to passports must be weighed in analyzing this question." 132 S. Ct. at 1428; see 132 S. Ct. at 1428-1430. At the conclusion of this summary, the Court's majority opinion declared that because the constitutional issues were not "simple," the case would be remanded so that this Court would have "the benefit of thorough lower court opinions to guide ***our analysis*** of the merits." 132 S. Ct. at 1430 (emphasis added). The case was remanded "to the lower courts to consider the merits ***in the first instance***." 132 S. Ct. at 1431 (emphasis added). The emphasized words imply that this Court anticipated re-visiting the constitutional issues and deciding them after it received the benefit of the lower court's analysis.

Moreover, the court of appeals noted in its opinions that it was an "inferior" court and would, on that account, be bound by dicta in opinions of this Court. See Pet. App. 30a, 54a. These otherwise gratuitous expressions of modesty suggest that the panel of the court of appeals entertained doubts regarding this dicta and anticipated that this Court would resolve uncertainties created by controversial dicta in this Court's past opinions.

IV.

THE BRIEF IN OPPOSITION MIS-STATES THE HISTORICAL EVIDENCE

The merits of the constitutional issues are best left to the plenary presentation of briefs and arguments on the merits. We note, however, that the government errs in claiming an "unbroken historical practice" according "sole authority" to the President to recognize foreign governments. See Br. in Opp., p. 14. In our brief in the court of appeals (pp. 30-38), and in our reply brief in that court (pp. 7-17), we demonstrated that Presidents Monroe, Jackson, Buchanan, Taylor, and Lincoln did not exercise "sole authority" over controversial recognition decisions but acknowledged that Congress had authority in this area and sought Congressional authorization or its consent to the President's recognition decisions.

Although the Solicitor General's Brief in Opposition (pp. 17-18 & n. 7) cites and discusses the recent article by Professor Robert J. Reinstein, who has completed an exhaustive study of the history of the recognition power, it fails to acknowledge Professor Reinstein's conclusion which states, in relevant part: "[T]he text, original understanding, post-ratification history, and structure of the Constitution do not support the more expansive claim that this executive power is plenary. Under these circumstances, executive recognition decisions are not exclusive but are subject to laws enacted by Congress." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temple L. Rev. 1, 56 (2013).

Nor did Congress "acquiesce," as the government asserts, in an "understanding" that recognition authority is exclusively the President's. See Br. in Opp., pp. 14, 16, 18. Indeed, President Jackson explicitly stated the reverse – *i.e.*, that he "acquiesced" in Congress' 1837 resolution recognizing Texas as an independent government. Message to the Senate (March 3, 1837), in 3 Andrew Jackson: A Compilation of the Messages and Papers of the Presidents, p. 366 (Richardson ed. 2004). During the McKinley Administration the Senate (29 Cong. Rec. 326, 332 (1896)) and then both Houses of Congress (31 Cong. Rec. 3988 (1898)) refused to "acquiesce" to a claim of exclusive Presidential authority and asserted that Congress had the power to recognize Cuba. The view of many Senators was expressed in a proposed resolution declaring that "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that island." 31 Cong. Rec. 3993 (1898). That is not the language of "acquiescence."

V.

THE ALLEGED "SENSITIVITY" OF THE STATUS OF JERUSALEM IS NOT A REASON TO DENY REVIEW

In its Brief in Opposition – as in virtually every pleading it has filed over the long history of this case – the government places front and center the "sensitivity" of the status of Jerusalem. This is a patent effort to intimidate the judiciary, which views itself as "not equipped" to evaluate foreign policy

(Pet. App. 47a), into believing that a decision in petitioner's favor will have disastrous consequences in the Middle East.

The State Department has represented in this case that permitting United States citizens born in Jerusalem to be identified as born in Israel will "cause irreversible damage" to the Middle East peace process. Yet the subject seems to be of great indifference to Palestinian representatives. Not a single brief has been filed by a Palestinian interest group throughout the history of this litigation.

This is not the first time this Court has been asked to determine a constitutional issue where the government claims that there will be serious consequences if its position is rejected. See, *e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 731 (White, J., concurring: "substantial damage to public interests"), 740-741 (Marshall, J., concurring: "grave and immediate danger to the security of the United States") (1971); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (Presidential action "necessary to avert a national catastrophe") (1952). In neither the *Pentagon Papers* case nor the *Steel Seizure* case did the government's doomsday prediction prove accurate. It is equally overblown here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,
Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR MEMBERS OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Congress regularly delegates limited administrative authority to the Secretary of State when exercising its law-making powers. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002), delegates to the Secretary of State the responsibility, on request, of recording the birthplace of an American citizen born in Jerusalem as "Israel" on a Consular Report of Birth Abroad and on a United States passport.

The question presented is whether Section 214(d) is unconstitutional on the grounds that the President's recognition power is not only exclusive, but is also so broad as to render invalid a statute properly enacted under Congress's passport and other foreign affairs powers simply because the President has determined, in his sole and unreviewable discretion, that the statute is tangentially related to recognition.

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INTEREST OF *AMICI CURIAE*

Amici curiae Members of the United States Senate and the United States House of Representatives have a fundamental institutional interest in defending the constitutionality of the statute at issue, which passed overwhelmingly in both Houses of Congress, and in seeing the directives of the Legislative Branch enforced in the courts. *Amici* also have a fundamental interest in safeguarding Congress's passport and foreign affairs powers from Executive overreach, which was endorsed by the court of appeals in its overbroad reading of the recognition power. The names of individual *amici* are listed in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below invalidated an Act of Congress on constitutional grounds, and handed the President significant new, unreviewable powers at Congress's expense, effectively reinstating the court of appeals' political question holding in the guise of a decision on the recognition power question. Although this Court has danced around the edges of the question presented for more than 200 years, it has never squarely addressed it. It should take the opportunity to do so now.

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief and consented to its filing.

This Court has already acknowledged the importance and unsettled nature of the question presented, and has already recognized its significant implications for the separation of powers and the role of Congress in foreign affairs: In granting certiorari to decide the threshold political question issue, this Court *sua sponte* directed the parties to brief and argue whether Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)—which permits "an American born in Jerusalem [to] choose to have Israel listed as his place of birth on his passport" and report of birth abroad, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012)—impermissibly infringes the President's power to recognize foreign sovereigns. And in remanding the question for the lower courts to review "in the first instance," it made clear that its resolution "demands careful examination of the textual, structural, and historical evidence put forward by the parties," both with respect to whether the President holds the recognition power exclusively, and whether the statute improperly infringes that power, or is instead a proper exercise of Congress's authority to "regulat[e] the content and issuance of passports" without directing the Executive in the exercise of any formal act of recognition, *id.* at 1429–31.

The decision below found little in the text of the Constitution or Founding-era historical evidence to support the President's claim of an exclusive and expansive recognition power. It instead relied on scattered dicta from this Court's opinions, and a selective review of later historical evidence, to not only assign the recognition power to the President, but also to grant him the unreviewable authority to decide, in his sole discretion, whether any particular congres-

sional act unconstitutionally invades that prerogative. *See infra* pp. 6–10. This represents an abdication of the lower court's responsibility to decide the constitutional question at the heart of this case, and cannot be squared with this Court's holding on the political question issue. *See Zivotofsky*, 132 S. Ct. at 1427 (criticizing the D.C. Circuit for treating the political question and constitutionality questions as "one and the same," left to the Executive's "unreviewable" discretion). For whatever exclusive power the President may have to recognize foreign sovereigns, "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." *Id.* at 1428. Yet the decision below grants to the Executive alone the power to do just that.

The court of appeals' adoption of the broadest possible view of the President's recognition power also threatens to demote Congress from the President's counterweight in foreign affairs to his minion. The Constitution grants to Congress a wide array of foreign affairs powers. *See infra* pp. 11–12. The implementation of foreign policy—including with respect to matters that implicate recognition—*depends* on Congress's exercise of these powers. *See, e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, §§ 1–9, 117 Stat. 864 (codified at 50 U.S.C. § 1701 note (2012)) (imposing trade and visa bans against Burma's military regime); *infra* pp. 13–14 (discussing additional examples). Our constitutional framework contemplates not only cooperation between the branches of government in this arena, but also a measure of tension. Indeed, in its division of powers, the Constitution is "an invitation to struggle for the privilege of directing American foreign policy." Edward S. Corwin, *The President: Office and*

Powers, 1787–1984 201 (Randall Bland et al. eds., 5th ed. 1984). Since the Founding, Congress and the President have been engaged in that fruitful and dynamic struggle. The zones of exclusivity for either branch have been drawn narrowly.

The D.C. Circuit's holding threatens to upset the Constitution's careful balance of powers in foreign affairs. The upshot of the decision below is not only that the President has plenary power over questions of recognition, but also that the Executive is given carte blanche to treat as unconstitutional—and to refuse to comply with—any Act of Congress that it determines touches on recognition policy. The recognition power cannot be drawn so broadly as to envelop completely, at the Executive's sole discretion, the exercise of Congress's law-making authority in the fields of immigration, naturalization, foreign commerce, passport control, criminal law, and foreign policy. *See* U.S. Const. art. I, §§ 1, 8; *infra* pp. 15–16.

Whether the recognition power is not only held exclusively by the Executive, but is also so sweeping as to render Congress impotent to act simply because the President determines, in his unreviewable discretion, that particular legislation implicates recognition policy, undoubtedly presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Review of this question would be warranted even if the court below had *upheld* the statute at issue. Here, where the court of appeals has "exercise[d] . . . the grave power of annulling an Act of Congress," due respect for a coordinate branch of government demands that certiorari be granted. *United States v. Gainey*, 380 U.S. 63, 65 (1965); Eugene Gressman et al., *Supreme Court Practice* 264 (9th ed. 2007) (collecting cases).

ARGUMENT

I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE REGARDING THE NATURE AND SCOPE OF THE RECOGNITION POWER.

This Court fully understands the importance and unresolved nature of the constitutional question presented here. Indeed, in previously granting certiorari to review the political question issue in this case, this Court *sua sponte* directed the parties to brief and argue the recognition power question. *M.B.Z. ex rel. Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011). And in ultimately leaving that question to the court of appeals to decide "in the first instance," this Court prescribed a "careful examination" of the conflicting "textual, structural, and historical evidence put forward by the parties regarding the nature of the . . . passport and recognition powers." *Zivotofsky*, 132 S. Ct. at 1430–31.

The court of appeals—making its way in "relatively uncharted waters with few fixed stars by which to navigate," *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 221 (D.C. Cir. 2013) (Tatel, J., concurring)—relied on inconclusive historical evidence and inapposite, scattered dicta from this Court's opinions to hold that the power to recognize foreign sovereigns not only rests exclusively with the Executive, but also stretches so far as to invalidate duly enacted federal legislation that, in the President's sole discretion, grazes the sphere of recognition. *See id.* at 207, 212–14 (majority op.). This Court should now grant certiorari "to resolve an important question left undecided" the first time it took this case. *F.T.C. v. Travelers Health Ass'n*, 362 U.S. 293, 297 (1960).

As a result, certiorari would be appropriate even if the court below had found Section 214(d) to be constitutional. But it is particularly important for this Court "to review the [court of appeals'] exercise of the grave power of annulling an Act of Congress" on constitutional grounds. *Gainey*, 380 U.S. at 65; *see also, e.g.*, *United States v. Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari."); Gressman, *supra*, at 264 (collecting cases). Due respect for a coordinate branch of the federal government demands that this Court review a decision by an inferior court invalidating an Act of Congress—particularly one that passed unanimously in the Senate and with near unanimity in the House of Representatives. The court of appeals should not have the last word on the constitutionality of Section 214(d).

1. As Judge Tatel recognized below, this Court "has had no occasion to definitely resolve the political branches' competing claims to recognition power," *Zivotofsky*, 725 F.3d at 222 (Tatel, J., concurring), let alone determine "that the President exclusively holds [that] power," *id.* at 212 (majority op.). Review is warranted on that basis alone, as this "important question of federal law" decided by the court of appeals "has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

To reach its holding, the court of appeals marshaled scattered dicta from this Court's prior decisions. All of the decisions the court below invoked address the binding effect of the Executive's decision on the *judiciary*—not Congress—absent any congressional opposition. *See, e.g.*, *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839) (noting that "[if] the ex-

ecutive branch . . . assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the *judicial* department" (emphasis added)).[2] None of these cases—which were naked "attempts to have the courts second-guess presidential recognitions," Richard B. Collins, *Nineteenth-Century Orthodoxy*, 70 U. Colo. L. Rev. 1157, 1164 n.47 (1999)—involves or discusses, let alone turns on, a conflict over recognition between Congress and the Executive. As a result, "[w]hat power Congress has to affect the recognition power by legislation has not been tested." *Id.*

Nor can any exclusive recognition power be implied from these cases. Under Justice Jackson's classic formulation, the Executive's exercise of power either "pursuant to an express or implied authorization of Congress" or "in absence of either a congressional grant or denial of authority" are substantively and analytically distinct from the circumstances present in this case: actions of the Executive "incompatible with the expressed . . . will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring). Thus, that this Court previously deferred to an *unopposed*

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[2] *See also, e.g.*, *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137–38 (1938) (accepting as "conclusive" the determination of the State Department because "[w]hat government is to be regarded here as representative of a foreign sovereign state *is a political rather than a judicial question*, and is to be determined by the political department of the government" (emphasis added)); *United States v. Belmont*, 301 U.S. 324, 328, 330 (1937) ("[W]ho is the sovereign of a territory is not a judicial question, but one the determination of which by the *political departments* conclusively binds the courts." (emphasis added)).

exercise of the recognition power by the Executive, does not—and cannot—suggest that such power is exclusive.

2. The dicta on which the court of appeals relied is not only scattered but also incomplete. For centuries, this Court has maintained that the judiciary is bound by the recognition decisions of *both* political branches. In *Oetjen v. Central Leather Co.*, the Court declared that the question "'who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the *legislative and executive departments* of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.'" 246 U.S. 297, 302 (1918) (emphasis added) (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890)). And in *United States v. Palmer*, this Court instructed that "the courts of the union must view such newly constituted government as it is viewed by the *legislative and executive departments* of the government of the United States." 16 U.S. 610, 643 (1818) (emphasis added). Even the cases relied on by the court below make clear that the exercise of recognition is a function of the "political departments," *Belmont*, 301 U.S. at 328—that is, both Congress and the Executive.

Tellingly, the only dicta from this Court to the effect that political recognition is "exclusively a function of the Executive"—*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964)—"simply mak[es] this statement in passing without any citation." Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 Va. L. Rev. 987, 1018 (2013). And that case did not involve any conflict between Congress and the Executive with re-

spect to recognition. Yet the court of appeals felt constrained to follow this statement, pursuant to D.C. Circuit law, which treats this Court's dicta as binding on the circuit court. *Zivotofsky*, 725 F.3d at 212.

Given the imprecision with which this Court has addressed the recognition power, it is not surprising that this Court's prior dicta alluding to the recognition power has generated significant confusion. This dicta not only is inapposite to the question presented, but also does not come from a well-constructed line of cases with a discernible development of the law over time. This Court should grant certiorari to reconcile these "prior decisions . . . [that are] inconsistent," Gressman, *supra*, at 253, and to "resolve" the "ambiguity in [its] own opinions," *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002).

3. Against this backdrop of inconclusive dicta, it is not surprising that history and practice also offer scant guidance on the precise source, meaning, and scope of the recognition power. The court of appeals itself acknowledged that "[n]either the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power." *Zivotofsky*, 725 F.3d at 206; *see also* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 820 (2011) ("[T]here is no originalist basis for the proposition that a plenary recognition power was vested in the President."). What little historical evidence is available yields no clear answer. In fact, while the President has traditionally taken the lead on questions of recognition, the historical record provides numerous instances "in which Congress played a decisive role

in recognition decisions," including where the Executive expressly acquiesced to Congress on such decisions, as noted by one of the principal authorities on the history of the recognition power relied on by the court below. *See* Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 51 (2013).

Thus, the court of appeals' conclusion that "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power," *Zivotofsky*, 725 F.3d at 207, is incorrect as a historical matter. That conclusion "overstates executive and understates legislative power," Reinstein, *supra*, at 51. While this Court readily relies on longstanding and consistent post-ratification practice to discern constitutional meaning, *see, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), it stands equally ready to set aside such evidence when it is "conflicting," *Clinton v. Jones*, 520 U.S. 681, 696, 705–06 (1997), as it is here, and to look instead to constitutional and separation of powers principles. *Id.*[3]

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[3] *See also, e.g.*, *Youngstown*, 343 U.S. at 634–35 (Jackson, J., concurring) (observing that "[a] century and a half of partisan debate and scholarly speculation . . . only supplies more or less apt quotations from respected sources on each side . . . . [that] largely cancel each other").

II. THE DECISION BELOW TRENCHES ON CONGRESS'S INTEGRAL ROLE IN FOREIGN AFFAIRS UNDER OUR CONSTITUTIONAL FRAMEWORK.

The decision of the court below effects a significant power shift in the direction of the President that should not be left to stand without review by this Court. Even assuming that there is some core recognition power held exclusively by the President, the court of appeals' adoption of the broadest possible view of that power—including the power to determine, in the President's sole discretion, that an Act of Congress infringes that power—lacks historical precedent and threatens to demote Congress from the President's counterweight in foreign affairs to his minion. This Court routinely grants certiorari in cases that are important to the "conduct of the Nation's foreign affairs," *Christopher v. Harbury*, 536 U.S. 403, 412 (2002); Gressman, *supra*, at 265–66—particularly where they raise separation of powers concerns. It should do so here.

1. The "conduct of the foreign relations of our Government" is shared between "the Executive and Legislative—'the political'—Departments." *Medellin v. Texas*, 552 U.S. 491, 511 (2008) (quoting *Oetjen*, 246 U.S. at 302). The Constitution equips Congress with a plethora of foreign affairs powers—including the power to "regulate Commerce with foreign Nations," "declare War," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," and "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. art. I, § 8)—as well as general law-making and appropriations powers that necessarily implicate foreign policy (*id.* §§ 1, 9). The Con-

stitution also gives Congress foreign affairs powers that it exercises in tandem with the President, such as treaty-making (*id.* art. II, § 2).

The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U.S. at 635. Accordingly, while the President properly takes the lead in performing the ceremonial act of recognition, in his role as the *instrument* of foreign policy, Congress plays an integral role in shaping that policy. *Cf.* Transcript of Oral Argument 38:7–9, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (Scalia, J.) [hereinafter Transcript of Oral Argument] ("[T]o be the sole instrument [of the U.S.] and to determine the foreign policy are two quite different things."). It has time and again done so.[4]

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[4] Some recent examples of Congress acting to shape recognition policy include the Syria Democracy Transition Act of 2012, S. 2152, 112th Cong. (2012) (calling for "the departure from power of [President] Bashar al-Assad"), and respective Senate and House of Representatives resolutions regarding Libya. *See* Calling for a No-fly Zone and the Recognition of the Transitional National Council in Libya, S. Res. 102, 112th Cong. (2011) (calling on the President to recognize Libya's Transitional National Council ("TNC") "as the sole legitimate governing authority in Libya"); Expressing the Sense of the House of Representatives Regarding the Regime of Mu'ammar al-Qadhaffi, H.R. Res. 188, 112th Cong. (2011) (declaring "the sense of the House of Representatives" that the TNC "should be considered the legitimate representatives of the Libyan people and nation," and calling for provision of "arms, supplies, and other materials needed to oust the Qadhaffi regime").

Indeed, the implementation of foreign policy—including with respect to matters that implicate recognition—*depends* on Congress's exercise of its foreign trade, immigration, naturalization, appropriations, passport, and general law-making powers. *See* U.S. Const. art. I, §§ 1, 8, 9; *see also, e.g.*, Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, tit. VII, 127 Stat. 198 (allocating funds appropriated for the Department of State, Foreign Operations, and Related Programs); Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, §§ 1–9, 117 Stat. 864 (codified at 50 U.S.C. § 1701 note (2012)) (supporting the U.S. recognition of the National League for Democracy by, *inter alia*, imposing trade and visa bans against Burma's military regime); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400 (amended 1954) (establishing quotas by country). When Congress acts in these spheres, its actions necessarily and properly touch on matters of recognition, without purporting to direct the Executive to alter formal recognition policy.

2. The Constitution contemplates not only cooperation between the branches in foreign affairs, but also a measure of tension. Indeed, in its sometimes oblique division of powers in this arena, the Constitution is "an invitation to struggle for the privilege of directing American foreign policy." Corwin, *supra*, at 201. Occasional friction between branches provides "'security . . . against a gradual concentration of the several powers in the same department,'" and is thus critical to our system of checks and balances. *Mistretta*, 488 U.S. at 381 (quoting *The Federalist No. 51*, at 349 (James Madison) (Jacob E. Cooke ed., 1961)). As Justice Jackson warned more than sixty years ago, the Executive's claim to plenary power

"must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

Since the Founding, Congress and the President have been engaged in that fruitful and dynamic struggle. The zones of exclusivity in foreign affairs for either branch have been drawn narrowly. Thus, Congress has enacted numerous statutes that register some degree of discord with the President's recognition policy. For example, after President Carter formally recognized the People's Republic of China, Congress enacted the Taiwan Relations Act, which provides that non-recognition does "not affect the application of the laws of the [U.S.] with respect to Taiwan" and commits the U.S. to helping Taiwan "maintain a sufficient self-defense capability." Pub. L. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)); *see also, e.g.*, United States-Hong Kong Policy Act of 1992, Pub. L. No. 102-383, 106 Stat. 1448 (codified at 22 U.S.C. §§ 5721–5724 (2012)) (providing that U.S. laws "shall continue to apply" to Hong Kong "[n]otwithstanding any change in . . . sovereignty," unless modified by law or executive order); Joint Resolution of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982) (frustrating President Reagan's support for the Contras by prohibiting the expenditure of funds "for the purpose of overthrowing the Government of Nicaragua"). None of these statutes has ever "been considered invalid as an invasion of [the President's] autonomy." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 445 (1977). And for good reason: this kind of Congressional action sustains the Constitution's system of checks and balances by enabling Congress to exercise levers of authority in foreign affairs as-

signed to it, while leaving to the Executive the final decision on the core question of formal recognition.

3. Section 214(d) does not impermissibly interfere with the President's power to effect recognition policy. To the contrary, it is the D.C. Circuit's decision that threatens to interfere with the necessary exercise of *Congress's* powers. The statute represents a valid exercise of Congress's "legislative Powers" over "Naturalization" and "Commerce with Foreign Nations," U.S. Const. art. I §§ 1, 8, and, by extension, immigration, *see Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893). It does not direct the Executive to issue any formal recognition or alter formal recognition policy. *Cf.* Transcript of Oral Argument 32:2–9 (Alito, J.) (emphasizing the difference between an "exclusive authority with respect to the formal recognition of a foreign country," and a "plenary," "unreviewable authority, with respect to anything that the President thinks has a bearing on the question of recognition"). It merely provides a U.S. citizen with the opportunity to fill in a particular field in that citizen's travel documents in a particular manner.

The court below acknowledged that legislation is not unconstitutional "merely [because it] touches on a policy relating to recognition," but then struck down Section 214(d) for exactly that reason, holding that the Executive's recognition power "'includes the power to determine the policy which is to govern the question of recognition.'" *Zivotofsky*, 725 F.3d at 213, 219 (emphasis omitted) (quoting *United States v. Pink*, 315 U.S. 203, 229 (1942)). The upshot of this decision is not only that the President has plenary power over questions relating in even the most tangential way to recognition, but also that the Execu-

tive is ceded the unreviewable authority to determine the scope of its own recognition power.

The court of appeals' decision thus places in the President's hands the unchecked power to determine for himself the legitimacy of broad swaths of otherwise valid legislation in critical areas comfortably within Congress's control, such as national security, immigration, and international trade, simply because the legislation implicates, however faintly, the subject of recognition—and to ignore any duly enacted Act of Congress thus categorized. *Cf.* Transcript of Oral Argument 33:5–25 (statement of the Solicitor General that any statute that "the Executive believes . . . constitutes . . . an incident of recognition" would be "within the scope of the Executive's power," and thus unconstitutional). The President's recognition power cannot properly be permitted to swallow Congress's legislative authority, or its integral role in the formulation and implementation of foreign policy, where the connection to formal recognition is so distant. This Court should grant certiorari to review this separation of powers question "of profound importance to the Nation." *Rumsfeld v. Padilla*, 542 U.S. 426, 455 (2004) (Stevens, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A:

Amici Curiae Members of The United States Senate

This Appendix provides *amici*'s affiliations for identification purposes.

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United States Senator
Member, Senate Finance Subcommittee on International Trade, Customs and Global Competitiveness

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United States Senator
Ranking Member, Senate Appropriations Subcommittee on the Department of State, Foreign Operations, and Related Programs

Carl Levin (D-MI)
United States Senator
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APPENDIX B:

Amici Curiae Members of The United States House of Representatives

This Appendix provides *amici*'s affiliations for identification purposes.

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JOINT APPENDIX

RECORD AND BRIEFS

No. 13-628

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z.
and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Opinion of the Court of Appeals for the District of Columbia Circuit, filed July 23, 2013..... 1a

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIVIL DOCKET #: 1:03-CV-01921-GK

Date Filed	No	Docket Text
09/16/2003	1	COMPLAINT against SECRETARY OF STATE (Filing fee $ 150.) filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Attachments: # 1 Exhibit 1# 2 Exhibit 2)(rje,) (Entered: 09/22/2003)
12/22/2003	6	MOTION to Dismiss *and Memorandum of Law in Support* by SECRETARY OF STATE. (Attachments: # 1 Exhibits to Memorandum of Law# 2 Proposed Order)(Lepore Matthew) (Entered: 12/22/2003)
02/05/2004	14	MOTION for Summary Judgment *and Memorandum of Law in Response to Defendant's Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment* by ARI Z. ZIVOTOFSKY. (Attachments: # 1 Appendix I# 2 Affidavit of Naomi Siegman Zivotofsky# 3 Exhibit 1 to Declaration of N. Zivotofsky# 4

Exhibit 2 to Declaration of N. Zivotofsky# 5 Text of Proposed Order)(Lewin, Nathan) (Entered: 02/05/2004)

03/11/2004 17 REPLY in support of motion re 6 *Defendant's Motion to Dismiss, as well as RESPONSE to Plaintiff's Motion for Summary Judgment, and RESPONSE to Plaintiff's Separate Statement of Facts* filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK, 1:03-cv-02048-GK (Lepore Matthew) (Entered: 03/11/2004)

03/11/2004 18 REPLY in support of motion re 8 *Defendants' Motion to Dismiss, and RESPONSE to Plaintiffs' (Odenheimer) Motion for Summary Judgment and Statement of Facts* filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK 1:03-cv-02048-GK (Lepore, M) Modified on 3/12/2004 (rje,). (Entered: 03/11/2004)

03/11/2004 19 Memorandum in opposition to motion re 14 for summary judgment; (SEE DOCUMENT NO. 17 FOR THE IMAGE OF THE PLEADING) filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-

GK(rje,) (Entered: 03/12/2004)

04/15/2004 20 REPLY to opposition to motion re 14 *Plaintiff's Motion for Summary Judgment* filed by ARI Z. ZIVOTOFSKY. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin,Nathan)(Entered:04/15/2004)

09/07/2004 21 MEMORANDUM OPINION granting 6 Defendant's Motion to Dismiss and denying 14 Plaintiff's Motion for Summary Judgment. Signed by Judge Gladys Kessler on 9/7/04. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (CS,) (Entered: 09/07/2004)

09/07/2004 22 ORDER granting [#6] Defendant's Motion to Dismiss and denying as moot [#14] Plaintiff's Motion for Summary Judgment. Signed by Judge Gladys Kessler on 9/7/04. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(CS,)-Entered: 09/07/2004)

10/28/2004 25 NOTICE OF APPEAL as to 22 Order, Order on Motion to Alter Judgment dated 10/25/04 by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Filing fee $ 255, receipt number 129011. (rje,) (Entered: 10/29/2004)

04/26/2006	33	USCA JUDGMENT (certified copy) as to 25 Notice of Appeal filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY; It is hereby ordered and adjudged that the case of the District Court appealed from in this cause is hereby remanded in accordance with the opinion of the court filed herein this date; USCA#04-5395 (jsc) (Entered: 05/10/2006)
10/03/2006	39	MOTION for Summary Judgment by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN-ZIVOTOFSKY. Attachments: # 1 Statement of Facts # 2 Memorandum In Support# 3 Declaration of Alyza D. Lewin# 4 Text of Proposed Order) Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Lewin, Alyza) (Entered: 10/03/2006)
10/03/2006	40	ADDITIONAL ATTACHMENT *Exhibits 1 through 3 to Declaration of Alyza D. Lewin* by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY 39 MOTION for Summary Judgment filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Errata 3)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin,Alyza)(Entered: 10/3/2006)

10/03/2006 41 ADDITIONAL ATTACHMENT *Exhibits 4 through 7 to Declaration of Alyza D. Lewin* by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY 39 MOTION for Summary Judgment filed by ARI Z. ZIVOTOFSKY, NAOMI-SIEGMAN ZIVOTOFSKY (Attachments: # 1 Exhibit 4# 2 Exhibit 5# 3 Errata 6# 4 Exhibit 7)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(LewinAlyza) (Entered: 10/03/2006)

10/03/2006 42 ADDITIONAL ATTACHMENT *Exh. 8 through 17 to Declaration of Alyza D. Lewin* by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY 39 MOTION for Summary Judgment filed by ARI Z. ZIVOTOFSKY,NAOMI SIEGMAN ZIVOTOFSKY, (Attachment: # 1 Errata 8# 2 Exhibit 9# 3 Exhibit 10# 4 Exhibit 11# 5 Errata 12# 6 Exhibit 13# 7 Exhibit 14# 8 Exhibit 15# 9 Exhibit 16# 10 Exhibit 17)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin,Alyza)(Entered: 0/03/2006)

10/03/2006 43 ADDITIONAL ATTACHMENT Exh. *18 (part 1 of 2) to Declaration of Alyza D. Lewin* by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY 39 MOTION for

		Summary Judgment filed by ARI ZIVOTOFSKY,NAOMI-SIEGMAN ZIVOTOFSKY. (Attachments: # 1 Exhibit 18 (part 1 of 2))Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Lewin, Alyza) (Entered: 10/03/2006)
10/03/2006	44	MOTION to Dismiss *or in the Alternative for Judgment as a Matter of Law* by SECRETARY OF STATE. (Attachments: # 1 Declaration of JoAnn Dolan) Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Coleman, Jacqueline) (Entered: 10/03/2006)
10/03/2006	45	ADDITIONAL ATTACHMENT *Exhibits 18 (part 2 of 2) through 21 to Declaration of Alyza D. Lewin* by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY 39 MOTION for Summary Judgment filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY,. (Attachments: # 1 Exhibit 18 (part 2 of 2)# 2 Exhibit 19# 3 Exhibit 20# 4 Exhibit 21)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin,Alyza)(Entered 10/03/2006)
10/03/2006	46	MOTION for Judgment by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-

GK,1:03-cv-02048-GK(tg)(See docket number 44 for scanned document) (Entered: 10/04/2006)

11/06/2006 47 RESPONSE to *Defendant's 44 Renewed Motion To Dismiss Or In The Alternative For Judgment As A Matter Of Law* filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. (Attachments: # 1 Addendum I)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Lewin, Nathan) Modified on 11/7/2006 tg. (Entered: 11/06/2006)

11/06/2006 48 Memorandum in opposition to re 39 MOTION for Summary Judgment filed by SECRETARY OF STATE. (Attachments: # 1 Counterstatement of Material Facts)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Coleman, Jacqueline) (Entered: 11/06/2006)

12/07/2006 50 REPLY to opposition to motion re 46 MOTION for Judgment, 44 MOTION to Dismiss *or in the Alternative for Judgment as a Matter of Law* filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK-(Simpson,W.)-(Entered: 12/07/2006)

12/07/2006	51	REPLY to opposition to motion re 39 MOTION for Summary Judgment filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin, Nathan) (Entered: 12/07/2006)
09/19/2007	52	ORDER denying as moot 39 Plaintiff's Motion for Summary Judgment; granting Defendant's 44 Renewed Motion to Dismiss; and denying as moot 46 Defendant's Motion for Judgment; this case is dismissed for lack of subject matter jurisdiction. Signed by Judge Gladys Kessler on 9/19/07. (CL) (Entered: 09/19/2007)
09/19/2007	53	MEMORANDUM OPINION to the Order on Motions to Dismiss and for Summary Judgment. Signed by Judge Gladys Kessler on 9/19/07. (CL,) (Entered: 09/19/2007)
10/18/2007	54	NOTICE OF APPEAL by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Filing fee $ 455, receipt number 1319094. Fee Status: Fee Paid. Parties have been notified. (Lewin, Alyza) (Entered: 0/18/2007)
07/10/2009	55	ORDER of USCA as to 54 Notice of

Appeal filed by NAOMI SIEGMAN ZIVOTOFSKY-ARI ZIVOTOFSKY; The judgment of the District Court appealed from in this cause is hereby affirmed. USCA Case Number 07-5347. (Attachments: # 1 USCA Opinion Argued 10/17/08 and Decided 7/10/09) (hsj,) (Entered: 07/17/2009)

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DOCKET #: 04-5395

Date Filed	Docket Text
11/29/2004	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Menachem Binyamin Zivotofsky. [862316-1]
05/18/2005	BRIEF filed by Appellant Menachem Binyamin Zivotofsky [896604-1]. Copies: 15. Certificate of service date 5/17/05, by mail.
05/18/2005	JOINT APPENDIX filed by Appellant Menachem Binyamin Zivotofsky [896605-1]. Copies: 10. Certificate of service date 5/17/05, by mail.
06/17/2005	CLERK'S ORDER filed [900735] granting motion for leave to file brief of amici curiae filed by Anthony D. Weiner, Michael R. McNulty, Joseph Crowley, J. D. Hayworth, Tom Lantos, Steve King, Pete Sessions, Henry A. Waxman, Shelley Berkley, Carolyn McCarthy, Howard L. Berman, Mark E. Souder, Gary L. Ackerman, Jim Saxton, Timothy H. Bishop, Dem Israel, Los Angeles [900047-1]; Directing Clerk to file the lodged brief [900043-1]; Granting motion for revision of briefing

schedule filed by Menachem Binyamin Zivotofsky [900733-1]; [881554-1] Appellee's brief now due on 7/20/05 and Appellant's reply brief now due on 8/10/05. [Entry Date: 6/17/05]

07/20/2005 BRIEF lodged by Amicus Curiae for Appellant Amer Assn Jewish Law, Amicus Curiae for Appellant Un Orthodox Amer [919603-1]. Copies: 15. Certificate of service date 7/20/05, by mail.

08/10/2005 BRIEF filed by Appellee Secy St [915753-1]. Copies: 15. Certificate of service date 8/10/05.

09/01/2005 REPLY BRIEF filed by Appellant Menachem Binyamin Zivotofsky [917994-1]. (Copies: 15). Certificate of service by mail dated 8/31/05.

11/10/2005 ORAL ARGUMENT HELD before Sentelle, Randolph, Rogers.

02/17/2006 JUDGMENT that the case is remanded to the District Court for the reasons in the accompanying opinion. Before Judges Sentelle, Randolph, Rogers. [Entry Date: 2/17/06]

02/17/2006 OPINION filed [950256] (11 pgs) for the Court by Judge Randolph

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DOCKET #: 07-5347

Date Filed	Docket Text
10/29/2007	CIVIL-US CASE docketed. Notice of Appeal filed by Appellants Ari Z. Zivotofsky and Naomi Siegman Zivotofsky. [1076246-1]
03/06/2008	BRIEF filed by Appellant Ari Z. Zivotofsky, Appellant Naomi Siegman Zivotofsky [1105030-1]. Copies: 13. Certificate of service date 3/5/08.
03/06/2008	APPENDIX filed by Appellant Ari Z. Zivotofsky, Appellant Naomi Siegman Zivotofsky [1105036-1]. Copies: 10. Certificate of service date 3/5/08.
04/04/2008	APPELLEE BRIEF [1110601] filed by Secretary of State [Service Date:04/04/2008] Copies: 15 (Final Brief); Pages: 1-10; Word Count for Brief: 10,328; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Attached [07-5347]
04/21/2008	APPELLANT REPLY BRIEF [1112-112] filed by Ari Z. Zivotofsky and Naomi Siegman Zivotofsky [Service Date:04/18/2008]Copies: 15 (Final

Brief); Pages: 1-10; Word Count for Brief: 1,783; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [07-5347]

10/17/2008 ORAL ARGUMENT HELD before Judge Griffith, Edwards and Williams [07-5347]

07/10/2009 PER CURIAM JUDGMENT filed [1195639] affirmed for the reasons in the accompanying opinion. Judge Griffith, Edwards and Williams [07-5347] (Lister, Mary)

07/10/2009 OPINION filed [1195643] (Pages: 12) for the Court by Judge Griffith, CONCURRING OPINION (Pages: 22) by Judge Edwards, terminating case [07-5347] (Lister, Mary)

08/21/2009 PETITION filed [1202302] by Appellants Ari Z. Zivotofsky and Naomi Siegman Zivotofsky for rehearing en banc. [Service Date: 08/21/2009 by US mail, email] Pages: 11-15. [07-5347] (Lewin, Nathan)

09/15/2009 RESPONSE FILED [1206383] by Secretary of State to order [1203732-2] [Service Date: 09/15/2009 by email] [07-5347] (Yelin, Lewis)

06/29/2010	PER CURIAM ORDER, En Banc, (in slip opinion format) filed [1252376] denying petition for rehearing en banc [1202302-2] Before Judges: Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh. [07-5347] (Circuit Judges Ginsburg, Rogers, and Kavanaugh would grant the petition for rehearing en banc)(A statement by Senior Circuit Judge Edwards is attached)
07/08/2010	MANDATE ISSUED to Clerk, District Court [07-5347]
05/02/2011	LETTER filed [1305951] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: The petition for writ of certiorari was Granted on 05/02/2011. [07-5347]
04/30/2012	JUDGMENT filed [1371538] by the Clerk of the Supreme Court of the United States notifying this court of the following disposition of the case before it: On 03/26/2012, the court Jgm Vacated/Rmd USCA. [07-5347]
05/14/2012	MANDATE RETURNED [1373531]. [07-5347]
05/15/2012	PER CURIAM ORDER filed [1373807] that the judgment issued on July 10, 2009, be vacated in accordance with the opinion of the

United States Supreme Court, Zivotofsky v. Clinton, 132 S.Ct. 1421 (2012). It is FURTHER ORDERED, on the court's own motion, that the Clerk enter a briefing schedule and place this case in the pool of cases for random assignment to a panel. [1195639-2] Before Judges: Griffith, Edwards and Williams. [07-5347]

05/15/2012 PER CURIAM ORDER, En Banc, filed [1373808] denying petition for initial hearing en banc [1372115-2] Before Judges: Sentelle, Henderson, Rogers, Tatel, Garland, Brown, Griffith, Kavanaugh, Edwards and Williams. [07-5347]

07/12/2012 CLERK'S ORDER filed [1383278] Upon consideration of the motion to revise caption, and the absence of any response thereto, it is ORDERED that the motion be granted. The clerk is directed to amend the docket to reflect the caption as indicated above. [1375530-2] [07-5347]

07/20/2012 APPELLANT BRIEF [1384737] filed by Menachem Binyamin Zivotofsky [Service Date: 07/20/2012] Length of Brief: 13,690 words. [07-5347] (Lewin, Nathan)

07/20/2012 *JOINT* APPENDIX [1384745] filed [Volumes: 1] [Service Date: 07/20/2012][07-5347](Lewin, Nathan)

10/10/2012	APPELLEE BRIEF [1398982] filed by Secretary of State [Service Date: 10/10/2012] Length of Brief: 13,973 words. [07-5347] (Kaersvang, Dana)
11/06/2012	APPELLANT REPLY BRIEF [1403484] filed by Menachem Binyamin Zivotofsky [Service Date: 11/06/2012] Length of Brief: 5,745 words. [07-5347] (Lewin, Nathan)
12/12/2012	CLERK'S ORDER filed [1409743] scheduling oral argument before Judges HENDERSON, ROGERS, TATEL Tuesday, 03/19/2013 AM [07-5347]
03/05/2013	PER CURIAM ORDER filed [1423718] allocating oral argument time as follows: Appellant -- 20 Minutes, Appellee -- 20 Minutes; directing party to file Form 72 notice of arguing attorney due 03/12/2013. [07-5347]
04/09/2013	ORAL ARGUMENT HELD before Judges Henderson, Rogers and Tatel. [07-5347]
07/23/2013	PER CURIAM JUDGMENT filed [1447972] that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons in the accompanying opinion. Before Judges: Henderson, Rogers and Tatel. [07-5347]

07/23/2013	OPINION filed [1447974] (Pages: 42) for the Court by Judge Henderson, CONCURRING OPINION (Pages: 11) by Judge Tatel [07-5347]
09/17/2013	MANDATE ISSUED to Clerk, District Court [07-5347]
10/10/2013	LETTER filed [1460753] by the Clerk of the Supreme Court of the United States notifying this court that the time for filing a petition for writ of certiorari has been extended to: 11/20/2013. [07-5347]
04/21/2014	LETTER filed [1489261] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in case No. 13-628: The petition for writ of certiorari was granted on 04/21/2014. [07-5347]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,
HaShoshan 10-A
Nofei Aviv
Beit Shemesh, Israel 99590
Plaintiff, No. 03-CV-

v.

THE SECRETARY OF STATE
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520
Defendant.

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

---

1. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. It seeks the enforcement of Section 214(d) of P.L. 107-228 with an injunction to compel officers of the United States to perform a duty owed to the plaintiff and a declaratory judgment pursuant to 28 U.S.C. § 2201. Venue is proper in this District under 28 U.S.C. § 1391(e).

2. The plaintiff was born on October 17, 2002, in the City of Jerusalem at Shaare Zedek Hospital.

3. The plaintiff's parents and "legal guardians" are Ari Z. Zivotofsky and Naomi Siegman Zivotofsky.

4. Both of the plaintiff's parents are native-born citizens of the United States. Ari Z. Zivotofsky was born on September 23, 1963, in Brooklyn, NY. Naomi Siegman Zivotofsky was born on June 18, 1965, in Philadelphia, PA.

5. By reason of the United States citizenship of both of his parents, plaintiff was a citizen of the United States at birth pursuant to Section 1401 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1401 (2002), and is entitled to registration as a United States citizen at a United States consulate and to issuance of a United States passport.

6. Public Law No. 107-228, signed into law by President George W. Bush on September 30, 2002, declares in Section 214(d) thereof:

(d) **RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES** – For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

7. The defendant is the "Secretary" specified in the statutory provision quoted in paragraph 6 and has actual and legal authority over personnel of United States embassies and consulates in foreign countries.

8. On December 24, 2002, plaintiff's mother, who is one of the plaintiff's "legal guardians," visited the Embassy of the United States in Tel Aviv, Israel, and requested that the plaintiff be registered as a United States citizen and issued a passport in which his place of birth would be designated as "Jerusalem, Israel." Officials at the United States Embassy refused to enter such a registration or to issue such a passport. They told the plaintiff's mother that such designation would be contrary to law. The plaintiff was issued a passport that records his place of birth as "Jerusalem" (Exhibit 1) and a "Consular Report of Birth Abroad" that omits the country of plaintiff's birth and designates only his city of birth as Jerusalem (Exhibit 2).

9. The defendant is required by Public Law 107-228 to instruct personnel at United States embassies and consulates to grant requests such as those made by the plaintiff's mother, to register the plaintiff as a United States citizen at birth born in Jerusalem, Israel, and to issue a passport to the plaintiff with the designation of "Jerusalem, Israel" as the place of birth. On information and belief, the defendant has not issued such instruction notwithstanding the enactment of Public Law 107-228.

WHEREFORE plaintiff demands the entry of a judgment against the defendant for a declaratory judgment and permanent injunction

(a) ordering the defendant to register the plaintiff as a citizen of the United States born in "Jerusalem, Israel" and to issue to the plaintiff a "Consular

Report of Birth Abroad" with "Jerusalem, Israel" as the place of birth;

(b) ordering the defendant to issue a passport to the plaintiff specifying the plaintiff's place of birth as "Jerusalem, Israel";

(c) ordering the defendant to instruct consular personnel at United States embassies and consulates to comply with Section 214(d) of Public Law 107-228;

(d) awarding to plaintiff attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and

(e) for such other further relief as this Court may deem just and proper.

Dated: September 16, 2003

s/Nathan Lewin
NATHAN LEWIN (D.C. Bar No. 38299)
ALYZA D. LEWIN (D.C. Bar No. 445506)
LEWIN & LEWIN, LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 828-1000
(202) 828-0909 fax
Attorneys for Plaintiff

The Secretary of State of the United States of America
hereby requests all whom it may concern to permit the citizen/national
of the United States named herein to pass without delay or hindrance
and in case of need to give all lawful aid and protection.

Le Secrétaire d'Etat des Etats-Unis d'Amérique
prie par les présentes toutes autorités compétentes de laisser passer le citoyen
ou ressortissant des Etats-Unis titulaire du présent passeport, sans délai ni
difficulté et, en cas de besoin, de lui accorder toute aide et protection légitimes.

El Secretario de Estado de los Estados Unidos de América por el presente solicita a las
autoridades competentes permitir el paso del ciudadano o nacional de los Estados Unidos
aquí nombrado, sin demora ni dificultades, y en caso de necesidad, prestarle toda la
ayuda y protección lícitas.

SIGNATURE OF BEARER/SIGNATURE DU TITULAIRE/FIRMA DEL TITULAR

NOT VALID UNTIL SIGNED

PASSPORT
PASSEPORT
PASAPORTE

USA

UNITED STATES OF AMERICA

Type / Type / Tipo: P
Code / Code / Código: USA
Passport No. / No. de Passeport / No. de Pasaporte: 710164736

Surname / Nom / Apellidos
ZIVOTOFSKY

Given names / Prénoms / Nombres
MENACHEM BINYAMIN

Nationality / Nationalité / Nacionalidad
UNITED STATES OF AMERICA

Date of birth / Date de naissance / Fecha de nacimiento
17 OCT 2002

Sex / Sexe / Sexo / Place of birth / Lieu de naissance / Lugar de nacimiento
M JERUSALEM

Date of issue / Date de expiration / Fecha de expedición
07 Jan 2003

Authority / Autorité / Autoridad
National Passport Center

Date of expiration / Date de expiration / Fecha de expedición
06 Jan 2008

Amendments / Modifications / Enmiendas
See Page 64

P<USAZIVOTOFSKY<<MENACHEM<BINYAMIN<<<<<<<<<<<

7101647365USA0210177MD801067<<<<<<<<<<<<<<<<D2

159-4167225

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

Consular Report of Birth Abroad

of a Citizen of the United States of America

This is to certify that MENACHEM BINYAMIN ZIVOTOFSKY sex MALE

born at JERUSALEM

on OCTOBER 17, 2002 acquired United States citizenship at birth as established by documentary evidence presented

to the Consular Service of the United States at TEL AVIV, ISRAEL

on DECEMBER 30, 2002

PARENTS

Father	Mother
ARI ZVI ZIVOTOFSKY	NAOMI TZIPPORA SIEGMAN ZIVOTOFSKY
Date of Birth SEPTEMBER 23, 1963	Date of Birth JUNE 18, 1965

(SEAL)

Sylvia L. Hammond

CONSULAR OFFICER

TEL AVIV, ISRAEL

DECEMBER 30, 2002

A Consular Report of Birth is proof of United States citizenship by law: 22 USC 2705

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,
HaShoshan 10-A
Nofei Aviv
Beit Shemesh, Israel 99590

Plaintiff,

No. 03-CV-01921 (GK)

v.

THE SECRETARY OF STATE
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Defendant.

DECLARATION OF NAOMI SIEGMAN ZIVOTOFSKY

NAOMI SIEGMAN ZIVOTOFSKY hereby affirms under penalty of perjury:

1. I am the mother of Menachem Binyamin Zivotofsky, the plaintiff in this action. The plaintiff is a minor. My husband, Ari Z. Zivotofsky, and I are the plaintiff's parents and "legal guardians."

2. Both my husband and I are native-born citizens of the United States. Ari Z. Zivotofsky was born on

[date of birth omitted], in Brooklyn, NY. I was born on [date of birth omitted], in Philadelphia, PA.

3. My husband and I live in Israel with our three children. Our address is HaShoshan 10-A, Nofei Aviv, Beit Shemesh, Israel.

4. Our son, Menachem Binyamin, was born on October 17, 2002, in the City of Jerusalem at Shaare Zedek Hospital.

5. On December 24, 2002, I visited the Embassy of the United States in Tel Aviv, Israel to register my son as a United States citizen and to apply for a United States passport and Consular Report of Birth Abroad. When I submitted my completed forms, I inquired as to the designation of the birth place on the documents. The clerk (whose badge indicated that his name was "George") informed me that they would say only "Jerusalem." When I requested that they say "Jerusalem, Israel" he explained that just as a baby born in Gaza City would not have a passport that states "Gaza City, Palestine", likewise, passports for children born in Jerusalem would not say "Jerusalem, Israel." George then told me to raise the issue with the next clerk with whom I would sign the forms. When I raised the issue with the next clerk, I was told that the United States cannot list "Jerusalem, Israel" as the place of birth because while the issue has been debated in Congress it has not become law.

6. On January 20, 2003, I received Menachem Binyamin's passport and Consular Report of Birth Abroad in the mail. His passport records his place of

birth as "Jerusalem" (copy attached as Exhibit 1). The Consular Report of Birth Abroad omits his country of birth and designates only his city of birth as "Jerusalem" (Exhibit 2).

7. My husband and I took up permanent residence in Israel in 2000 while retaining our American citizenship, as part of our religious belief that Jews should live in Israel, which is the Jewish State.

8. My husband and I were raised in the United States. We respect and appreciate America and the democratic principles for which this Country stands. We also treasure and value our status, and the status of our children, as American citizens. We accepted citizenship in Israel and became dual nationals of both countries because it is important to us, as a matter of conscientious conviction, that we be part of the Jewish State as well as citizens of the United States.

9. It is important to us as a matter of conscience and we believe it will be important to our children that, if born in Israel, they be recognized as natives of Israel, and that the country of birth not be erased nor omitted from their travel documents or from their official certificates of birth.

10. It is also important to us as American citizens that our rights under United States law be protected and enforced. By specifically requesting that Menachem Binyamin's passport and registration of birth designate his country of birth as "Israel," we followed the law. Our request was ignored and our rights under the law were violated.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30th 2004

s/Naomi Siegman Zivotofsky
Naomi Siegman Zivotofsky

**UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.**

Menachem Binyamin ZIVOTOFSKY, by his parents and guardians, Ari Z. and Naomi Siegman ZIVOTOFSKY, Plaintiffs,

v.

THE SECRETARY OF STATE, Defendant.

Dan Odenheimer and Jocelyn Odenheimer, as Next Friend of E.O., their Minor Child, Plaintiffs,

v.

United States Department of State and Colin L. Powell, in his capacity as Secretary of State, Defendant.

Civil Action Nos. 03-1921, 03-2048.
Sept. 7, 2004.

Nathan Lewin, Alyza Doba Lewin, Lewin & Lewin, LLP, Washington, DC, for Plaintiffs.

Jacqueline E. Coleman Snead, W. Scott Simpson, U.S. Department of Justice, Washington, DC, for Defendant.

MEMORANDUM OPINION

GLADYS KESSLER, District Judge.

*1 Plaintiff, Menachem Binyamin Zivotofsky, by his parents and guardians Ari Z. and Naomi

Siegman Zivotofsky, brings suit against the Secretary of State in CA 03-1921. Plaintiffs Dan Odenheimer and Jocelyn Odenheimer, as Next Friend of E.O., their Minor Child, bring suit against the United States Department of State and the Secretary of State in CA 03-2048. Both Plaintiffs challenge Defendant's failure to implement Section 214(d) of the Fiscal Year 2003 Foreign Relations Authorization Act, Pub.L. 107-228, which requires the Department of State to list an individual's place of birth as "Jerusalem, Israel," rather than "Jerusalem," upon request. This matter is now before the Court on Defendant's Motions to Dismiss in both cases and Plaintiffs' Motions for Summary Judgment in both cases. Upon consideration of the Motions, Oppositions, Replies, and the entire record herein, for the reasons stated below, Defendant's Motions to Dismiss are **granted** and Plaintiffs' Motions for Summary Judgment are **denied as moot.**

I. BACKGROUND[FN1]

> FN1. For purposes of ruling on a motion to dismiss, the factual allegations of the complaint must be presumed to be true and liberally construed in favor of the plaintiff. *Shear v. Nat'l Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C.Cir.1979).

The status of Jerusalem is a hotly contested issue, one that has consumed policymakers in the United States and the Middle East for the past fifty years. [FN2] Jerusalem has special religious and cultural significance for Jews, Muslims, and Christians. Resolving the issue of sovereignty over

Jerusalem therefore has been one of the many roadblocks in the negotiations over the Middle East conflict.

> FN2. While the Defendant provided a comprehensive history of United States policy toward Jerusalem over the last fifty years, it is not necessary for the Court to explore that history in detail at this time.

The position of the United States is that "Jerusalem's final status has not yet been determined and will be settled by Permanent Status Negotiations between the parties to the Middle East conflict." Def.'s Mot. to Dismiss, at 8. Pursuant to the policy, United States citizens born in Jerusalem are identified on their passports with only their city of birth; no country of birth is listed, because the United States does not at this time recognize any sovereign over the city.

In 2003, Congress enacted the Foreign Relations Authorization Act. Pub.L. 107-228. Section 214(d) of that statute provides that:

> Record of Place of Birth as Israel for Passport Purposes-For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

2003 Foreign Relations Authorization Act, Pub.L. 107-228, § 214(d).

Plaintiffs' parents are United States citizens raising their families in Jerusalem. Plaintiff Zivotofsky and Plaintiff E.O. were born shortly after Section 214(d) was signed. The parents of each child sought to obtain passports for their children at the United States Consulate General in Jerusalem. Each parent requested that the passport list the child's place of birth as "Jerusalem, Israel." Those requests were denied, and each child received a passport that listed the place of birth only as "Jerusalem."

In September, 2003, Plaintiff Zivotofsky filed suit against the Secretary of State, claiming that Defendant's failure to follow the mandate of Section 214(d) breached a duty owed to him. Plaintiff Zivotofsky seeks a declaratory judgment against Defendant. Plaintiff Zivotofsky also seeks an injunction ordering the Defendant to issue a Consular Report of Birth Abroad with "Jerusalem, Israel," listed as the place of birth; ordering Defendant to issue a passport to Plaintiff specifying his birthplace as "Jerusalem, Israel"; and ordering Defendant to instruct consular personnel at United States embassies and consulates to comply with Section 214(d).

In October, 2003, Plaintiff Odenheimer filed a Writ of Mandamus, claiming that Defendant breached a duty to Plaintiff by failing to comply with Section 214(d) and that Defendant has violated Plaintiffs' rights to due process and equal protection under the Fifth Amendment of the United States Constitution. Plaintiff Odenheimer seeks a declaratory judgment that Defendant violated Section 214(d) and that Defendant issue a passport

and registration of birth for E.O. recording his place of birth as Israel. Plaintiff Odenheimer also seeks an injunction compelling Defendant to comply with Section 214(d) and to issue a passport and registration of birth listing E.O.'s birthplace as Israel. Additionally, Plaintiff Odenheimer seeks a mandamus compelling Defendant to perform his duties under Section 214(d) and to issue a passport and registration of birth recording E.O.'s birthplace as Israel. Finally, Plaintiff seeks attorneys' fees, costs, and other expenses.

Because of the common issues presented, the Court consolidated the two cases on February 5, 2004.

II. STANDARD OF REVIEW

A complaint "should not be dismissed unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994). Thus, "the complaint is construed liberally in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Id.* However, if inferences or legal conclusions drawn by the plaintiffs are "unsupported by the facts set out in the complaint," the Court need not accept them. *Id.*

III. ANALYSIS

Defendant seeks to dismiss the complaints of both Plaintiffs pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6). Defendant alleges five separate reasons why Plaintiffs' claims should be dismissed. First, Defendant argues that the Plaintiffs lack Article III

standing because they have sustained no injury in fact. Second, Defendant argues that the case presents a nonjusticiable political question. Third, Defendant alleges that the President properly interpreted the statute as permissive rather than mandatory. Fourth, Defendant argues that mandamus was an improper form of relief. Fifth, Defendant alleges that the Due Process and Equal Protection claims are without merit.

Because the Court finds that the cases should be dismissed for lack of standing and because they are nonjusticiable political questions, it is unnecessary to reach the remaining three arguments raised by Defendant. FN3

> FN3. Although it is unnecessary to reach the Plaintiff's Fifth Amendment claim, the Court notes that it is without merit. There is neither a fundamental right at issue nor a classification that disadvantages a suspect class. *Hutchins v. District of Columbia*, 188 F.3d 531, 536 n. 1 (D.C.Cir.1999); *Massachusetts Brd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The right to particular wording on a passport does not, in this case, implicate the right to travel or any other fundamental right. Furthermore, Section 214(d) does *not* discriminate on the basis of religion or national origin, as Plaintiff Odenheimer asserts. It merely sets guidelines for passport policy, applicable to all, regardless of religion or national origin.

A. Plaintiffs Lack Article III Standing

Article III of the Constitution vests jurisdiction in the federal courts only over cases and controversies. U.S. Const. art. III, § 1. In order to meet the "case or controversy" requirement, plaintiffs must have standing to bring their claims. *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996). To establish standing, the plaintiff must show (1) an injury in fact that is (2) fairly traceable to the challenged act and (3) likely to be redressed by a favorable decision. *Id.*

Defendant argues that Plaintiffs lack standing because they have suffered no injury in fact. Injury in fact requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.' " *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendant asserts that Plaintiffs have neither a legally protected interest in particular passport wording nor a concrete injury based on the failure to obtain that wording. Defendant argues that Plaintiffs' claims are actually a thinly veiled objection to the Executive Branch's policy toward Jerusalem.

Plaintiffs respond that they have suffered a concrete injury because they have been denied a statutory right conferred by Section 214(d). Plaintiffs rely on *Warth v. Seldin*, in which the Supreme Court said "the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197,

45 L.Ed.2d 343 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). According to Plaintiffs, Defendant's refusal to issue a passport with the desired wording automatically constitutes a concrete injury, because such wording is required by statute.

Plaintiffs' argument is not persuasive. Statutes only create standing where they involve "justiciable individual rights." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Thus, the mere existence of a statute does not negate "the requirement that the party seeking review must himself have suffered an injury." *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Plaintiffs, therefore, must still prove that Defendant's failure to put "Jerusalem, Israel," on their passports has caused an injury in fact. The existence of the statute does not enable them to avoid that stringent requirement.

Plaintiffs' argument that they have "los[t][an] opportunity to pursue a benefit" is similarly unpersuasive. *CC Distribs., Inc., v. United States*, 883 F.2d 146, 150 (D.C.Cir.1989). In *CC Distributors*, the defendant's change in policy caused plaintiffs to lose their opportunity to pursue a government contract, which, if awarded, would have provided plaintiffs with demonstrable financial benefit. *Id.* In this case, however, receiving the "benefit" lost by the Plaintiffs would not change their status in any demonstrable way. Plaintiffs have valid U.S. passports with no restrictions and are citizens of both the United States and Israel. If Plaintiffs' requested relief were granted, they still

would have valid passports and would be citizens of both the United States and Israel.[FN4] They would gain no rights they did not have to begin with. If, as they allege, they have suffered the loss of some "psychological benefit," that loss still does not rise to the level of a cognizable injury in fact.[FN5] The alleged injury therefore is not sufficiently concrete, particularized, or actual to constitute an injury in fact and does not confer standing upon the Plaintiffs in this case.

FN4. Plaintiffs argue that their interest in maintaining their citizenship and nationality as Israelis is somehow affected by the Defendants' policy. However, Plaintiffs are citizens of both the United States and Israel. Their status as citizens of Israel is unchanged by the wording of their United States passport. Likewise, their status as United States citizens is unchanged by the failure to list a country of birth.

FN5. The Zivotofsky Plaintiffs argue that they have standing to challenge the Defendant's decision because it does not comport with their religious beliefs. "Religious beliefs (or beliefs that oppose religion) have always been recognized as conferring standing to challenge laws that affect an entire society." Pl. Zivotofsky's Reply, at 5. The Plaintiffs cite no cases to support this point. Furthermore, their reliance on this point supports Defendant's position that their complaint is simply an expression of their general disagreement with the policy of the United States toward

Jerusalem. A "generally available grievance about government" is too abstract to confer standing, however. *Lujan*, 504 U.S. at 573-74.

B. Plaintiffs Present a Nonjusticiable Political Question

Federal courts also lack Article III jurisdiction over cases that present political questions. Cases present a political question if, among other things, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Thus, if an issue is committed by the Constitution to either the Executive Branch or the Legislative Branch, it is outside the Court's jurisdiction.

According to Defendants, the issue in this case is territorial sovereignty and state recognition, which is a Constitutional responsibility of the Executive and thus is nonjusticiable. Defendant notes that the Supreme Court has specifically held that recognition of foreign governments is an executive power. Defendant, therefore, argues that recognition of foreign governments is constitutionally committed to the Executive.

Plaintiffs argue that the issue before the Court is passport policy, not recognition of sovereigns. According to Plaintiffs, the decision to place "Jerusalem" versus "Jerusalem, Israel," is a simple administrative matter with little or no effect on foreign relations. This argument borders on the disingenuous. The status of Jerusalem is without question one of the most sensitive foreign policy

issues to have confronted the world in recent years. The desired passport wording in this case would confer recognition in an official, diplomatic document that Israel has sovereignty over Jerusalem. To argue that this is merely a routine administrative issue ignores the last fifty to sixty years of violence in the Middle East. The question at hand involves the authority to recognize sovereigns and conduct foreign policy, not the bureaucratic procedures for issuance of passports.

The caselaw makes clear that the recognition of sovereigns is constitutionally committed to the Executive. "It is undisputed that the Constitution gave the President full constitutional authority to recognize the [People's Republic of China] and to derecognize the [Republic of China]." *Goldwater v. Carter*, 617 F.2d 697, 707-08 (D.C.Cir.1979) (*en banc*), *vacated on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979); *see also United States v. County of Arlington, Virginia*, 669 F.2d 925, 929 (4th Cir.1982) ("the President is empowered to recognize the government of a foreign state"); *Ams. United for Separation of Church and State*, 786 F.2d 194, 202 (2nd Cir.1986) (referring to recognition of sovereigns as "one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch").

Because the recognition of governments is constitutionally committed to the Executive, this case falls squarely within the framework set forth in *Baker v. Carr*, and, therefore, falls outside the jurisdiction of this Court. 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

IV. CONCLUSION

For the foregoing reasons, Defendant's Motions to Dismiss are **granted.** The Court finds that the Plaintiffs lack standing because they have suffered no injury in fact. Furthermore, the Court finds that the issue before the Court is a nonjusticiable political question and that the Court therefore lacks jurisdiction.[FN6]

> FN6. In light of the Court's ruling on Defendant's Motions to Dismiss, Plaintiffs' Motions for Summary Judgment are **denied as moot.**

An Order will issue with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,

Plaintiff, Civil Action No. 03-1921 (GK)
v.

THE SECRETARY OF STATE

Defendant.

DEFENDANT'S RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS RELATING TO "POLITICAL QUESTION" ISSUE

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendant, by and through undersigned counsel, hereby responds to Plaintiff's Requests for Admissions Relating to "Political Question" Issue.

GENERAL OBJECTIONS

1. Defendant objects to each and every Request for Admission to the extent it is outside the scope of the D.C. Circuit's mandate and the District Court's Order of April 18, 2006, which define the permissible scope of discovery.

2. Defendant objects to each and every Request for Admission to the extent it seeks information protected by the attorney-client, attorney-work

product, deliberative process, or other recognized privilege.

3. Defendant objects to each and every Request for Admission to the extent it seeks information whose disclosure is prohibited by statute, regulation, or Executive Order.

4. Defendant reserves the right to amend, supplement, or alter the objections to these Requests for Admissions at any time.

Without waiving any of these General Objections, which are incorporated into each response below, Defendant responds as follows.

REQEUSTS FOR ADMISSIONS

1. United States citizens traveling in foreign countries are routinely indentified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Admits.

2. The principal reason for declaring a "place of birth" on a United States passport is to specify a detail that is not subject to change and that identifies a passport-holder.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this

Request for Admission, Defendant responds as follows: Denies except to admit that identification is the principal reason that U.S. passports require "place of birth."

3. Letters or other material sent from the Department of State by mail to addresses in West Jerusalem are addressed "Jerusalem, Israel."

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that as a matter of practice, correspondence sent from the Department that is destined for Jerusalem generally is sent by diplomatic pouch to the U.S. Consulate General in Jerusalem for forwarding in accordance with local postal conventions. The Department sends passports issued at the National Passport Center and Charleston Passport Center to the Consulate in Jerusalem through express mail. The packages are addressed to:

> Consular Section
> American Citizens Services
> U.S. Consulate General Jerusalem
> Consular Section 27 Nablus Road
> Jerusalem, 94190

As an exception to that practice, where Israel has provided an official address for notification or correspondence under an international agreement, the Department generally would send correspondence directly to that address. For example, under the Convention of 25 October 1980

on the Civil Aspects of International Child Abduction, the State Department sends official correspondence for Israel authorities to the following address, which Israel registered under the Convention for its Central Authority:

International Department of the State
Attorney's Office
Ministry of Justice
29 Salah A-din St.
PO Box 49029
JERUSALEM 91490
Israel

4. Consular Reports of Birth Abroad are provided to the parents of United States citizens born abroad for their use and are not, in the absence of specific legal demand or process, given to foreign governments or their representatives.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that Consular Reports of Birth Abroad are provided upon request to the parents of U.S. citizens born abroad. The department further avers that there are no restrictions on the recipient's use of such documents and the U.S. Government may disclose the document for purposes, and in a manner, consistent with U.S. law.

5. There is no sovereign state called "Palestine" and there has been no sovereign state by that name for the past 200 years.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that the United States does not recognize, and has not recognized, a sovereign state called "Palestine" and that "Palestine" was the name of the territory under British mandate until 1948.

6. There is no sovereign state called "West Bank" or Gaza Strip."

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that the United States does not recognize and has not recognized, a sovereign state called "West Bank" or "Gaza Strip."

Dated:
June 5, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
Civil Division

KENNETH L. WAINSTEIN
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

/s/Jacqueline E. Coleman
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,

Plaintiff, Civil Action No. 03-1921 (GK)
v.

THE SECRETARY OF STATE

Defendant.

DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES TO DEFENDANT RELATING TO "POLITICAL QUESTION" ISSUE

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant, by and through undersigned counsel, hereby responds to Plaintiff's Interrogatories to Defendant Relating to the "Political Question" Issue.

GENERAL OBJECTIONS

1. Defendant objects to each and every Interrogatory to the extent it is outside the scope of the D.C. Circuit's mandate and the District Court's Order of April 18, 2006, which define the permissible scope of discovery.

2. Defendant objects to each and every Interrogatory to the extent it seeks information

protected by the attorney-client, attorney-work product, deliberative process, or other recognized privilege.

3. Defendant objects to each and every Interrogatory to the extent it seeks information whose disclosure is prohibited by statute, regulation, or Executive Order.

4. Defendant objects to each and every Interrogatory to the extent it seeks information from components of the United States government outside the control of the Department of State.

5. Defendant objects to each and every Interrogatory to the extent it is unduly burdensome, unduly vague, duplicative, or irrelevant.

6. Defendant objects to each and every one of Plaintiff's Instructions to the extent that they seek to impose burdens inconsistent with or in addition to those required under the Federal Rules of Civil Procedure.

7. Defendant reserves the right to amend, supplement, or alter the objections to these Interrogatories at any time.

Without waiving any of these General Objections, which are incorporated into each response below, Defendant responds as follows.

INTERROGATORIES

1. When was "place of birth" or its equivalent first made part of a United States passport? Why was that done?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: Place of birth was first added to the U.S. passport designed in 1917. We have not located any documents identifying the initial reason for including this information. A 1963 staff study by the Passport Office on "Place of Birth" information in the United States Passport reflects "the passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily as part of the identification of the bearer. A search of the precedent files in the Passport Office library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances." The Department is producing the staff study dated October 4, 1963, a 1976 Department of State publication entitled "The United States Passport, Past, Present, Future," and material related to 1977 and 1985 surveys. Early 19th and 20th century consular instructions on issuance of passports and place of birth in passport applications are also being produced.

2. When were 7 FAM 1383.5-4, 7 FAM 1385.5-5, and 7 FAM 1383.5-6 added to the Foreign Affairs Manual? Why were they added?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: All three referenced provisions were published on October 15, 1987, as part of a general revision of the entire volume 7 of the Foreign Affairs Manual. These provisions replaced 8 FAM 249.24 and 7 FAM 249.24f guidance published April 15, 1974, concerning transcription of birth place names in passports. The changes incorporated in these three provisions mirrored domestic U.S. passport practice regarding transcription of place of birth names in passports as reflected in domestic passport instruction 2500.5H of May 10, 1987.

The predecessor to 7 FAM chapter 1300, which contains the three above-referenced provisions, was volume 8 of the Foreign Affairs Manual. The Department is producing copies of 1968 – 8 FAM 349.24f Guide for Use in Transcribing Birthplaces Located Outside the United States, 1969 – 8 Foreign Affairs Manual (FAM) 249.24, 8 FAM 349.24f Guide for Use in Transcribing Birthplaces Located Outside the United States, and 1974 – 8 Foreign Affairs Manual (FAM) 249.24 (1974).

The earliest domestic passport instruction the Department has been able to locate is Divisional Instruction D-71, January 31, 1958. Page 6 and page 8 pertain to instructions regarding birth in Jerusalem or Palestine. Domestic passport instruction 2500.5H of May 10, 1987 updated domestic passport instruction 2500.5G of April 17, 1985, which superseded domestic passport instruction 2500.5D of May 3, 1972. Domestic

passport instruction 2500H of May 10, 1987 was modified by domestic passport instruction 2120 of February 25, 1993.

3. How many currently valid United States passports show the bearer to have been born in (a) "Israel" (b) "Jerusalem" (c) "Palestine" (d) "Tel Aviv" (e) "Haifa" (f) "Jericho" (g) "Nablus" (h) "Ramallah" (i) "West Bank" (j) "Gaza Strip" (k) other cities or towns located within the borders of Israel?

RESPONSE: Defendant specifically objects to (1) subparts (c), (f), (g), (h), (i) and (j) of this Interrogatory as outside the scope of permissible discovery; (2) subparts (d) and (e) as unduly burdensome to identify and retrieve data because the Department's electronic database does not maintain separate information regarding Tel Aviv or Haifa, and (3) subpart (k) of as ambiguous and unduly burdensome for Defendant to identify and retrieve data for all other "cities or towns located within the borders of Israel" because the borders of Israel have not been finalized in a number of respects and there may be several hundred cities, towns, and villages, depending upon how those terms are defined, that are commonly understood to be "within the recognized borders of Israel." Defendant also specifically objects to this Interrogatory to the extent that it implies a statement on whether the listed places are within the recognized borders of Israel. Subject to these specific objections and the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The Department does not maintain a database that

allows an accurate response to this Interrogatory; however, it does maintain data bases from which the Department can compute the number of passports issued each year based on certain specific places of birth. The numbers provided below reflect all issuances for the past ten years. That ten-year period was chosen because passports generally are issued with ten-year validity (five years for children under 14, diplomats, other U.S. government civilian and military officials, and their families); however, the totals will include passports that are no longer valid for various reasons, including that the passports were replaced.

POB	Ten-year Count	Five-year Count	Total
Israel	80,769	18,408	99,177
Jerusalem	28,625	23,944	52,569
		Total	151,746

4.(a) Do passports issued within the United States to United States citizens born in Jerusalem indicate that the passport-holder was born in "Israel?"

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: No correctly issued U.S. passport identifies the birth place of U.S. citizens born in Jerusalem as "Israel;" however, the Department is aware that errors have been made and has taken steps to ensure that such errors are not repeated and that with respect to such passports, which were limited to 5-year validity, because they were issued to individuals under age 14, the errors will be corrected at the time of passport renewal. The Department is also producing

1991 correspondence regarding an error in the issuance of a passport to a minor born in Jerusalem in 1985 mistakenly listing Israel as the place of birth, after excising identifying information in accordance with the Privacy Act.

(b) If the answer to subparagraph (a) is "no," please explain why the passport of Yonatan Tal Feigelson issued in Washington, D.C., on March 28, 2006, (Exhibit 1) showed the place of his birth as "Israel," and the passport of Yael Adina Zahava Wolicki issued in Washington, D.C., on April 27, 2005, (Exhibit 2) showed that the place of her birth as "Israel" although the applications for their passports indicated that they were born in Jerusalem and the cancelled passport of Yonaton Tal Feigelson (Exhibit 3) indicated he was born in "Jerusalem."

RESPONSE: Defendant specifically objects to this Interrogatory under the Privacy Act.

5. Describe specifically any harm to the foreign policy of the United States that would result if American citizens born in Jerusalem carried U.S. passports that showed their "place of birth" as "Israel."

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel, whether in the context of listing Israel as the place of birth for individuals

born in Jerusalem, when issuing U.S. passports or Consular Reports of Birth Abroad, which are official statements of the U.S. Government, or in any other official public context. Misstatements and clerical errors in isolated official documents pertaining to Jerusalem can be explained as not reflecting any change in official policy or practice with respect to the status of Jerusalem. On the other hand, an official decision by the United States to begin to treat Jerusalem as a city located within Israel at the present time would represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests.

The status of Jerusalem has remained in dispute since 1948 as the result of wars, key United Nations Resolutions, and other interim arrangements and understandings between the parties to the Arab-Israeli conflict. These parties recognized the special status of Jerusalem when they agreed in 1993 that the status of Jerusalem and certain other issues would be addressed in permanent status negations. The United States policy since the Truman Administration has consistently been to promote a final and permanent resolution of final status issues, including the status of Jerusalem, through negotiations by the parties and supported by the international community.

The President and his Administration have remained committed to a just and durable peace between Israel and the Palestinians and to the President's vision, as laid out on June 24, 2002, for a settlement negotiated between the partied based on

U.N. Security Council Resolutions 242 and 338, with Israeli withdrawal to secure and recognized borders. In the context of such a settlement, the President stated that questions concerning Jerusalem and other issues must also be resolved. http://www.state.gov/p/nea/rt/13544.htm. The U.S. Administration, in cooperation with Russia, the European Union, and the United Nations (collectively, "the Quartet"), developed A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" that was presented to Israel and the Palestinians on April 30, 2003 http://www.state.gov.p/nea/rls/rm/20115.htm. Phase III of the Roadmap for Peace provides for Israeli-Palestinian negotiations aiming at a permanent status agreement on borders, Jerusalem, refugees and settlements. http:www.state.gov/documents/organization/36464.pdf. The President met with the leaders of Jordan, Israel and the Palestinian Authority on June 4, 2003 at Aqaba, Jordan and confirmed in a joint press conference that "All here today now share a goal: the Holy Land must be shared between the state of Palestine and the state of Israel, living at peace with each other and with every nation in the Middle East. All sides will benefit from this achievement and all sides have responsibilities to meet. As the road map accepted by the parties makes clear, both must make tangible, immediate steps toward this two-state vision."

Although the timetable envisioned in 2003 has not been met, the President has confirmed this longstanding U.S. policy, most recently on May 23, 2006 during the visit of Israel's Prime Minister Ehud Olmert to Washington, when he stated:

> In 2002, I outlined my vision of two democratic states, Israel and Palestine, living side-by-side in peace and security. Prime Minister Olmert told me that he and his government share this vision. The international community seeks to realize this goal to the road map, which calls for a comprehensive settlement that resolves all outstanding issues between Israelis and Palestinians. I believe, and Prime Minister Olmert agrees, that a negotiated final status agreement best serves both the Israelis and the Palestinians, and the cause of peace. http://www.whitehouse.gov/news/releases/2006/05/print/20060523-9.html.

To the extent U.S. Government maps and official publications refer to Jerusalem as the capital of Israel, they are to make clear by footnote, such as in the Department of State's "Background Notes for Israel, that "Israel proclaimed Jerusalem as its capital in 1950. The United States, like nearly all other countries, maintains its embassy in Tel Aviv." In addition, the U.S. Consulate in Jerusalem reports directly to the Department of State rather than through the U.S. Embassy in Tel Aviv.. The Department's policy on designation of Jerusalem as place of birth in passports and on birth and death certificates is another manifestation of this policy.

Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located

within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the Roadmap. The Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own. It would be seen as a breach of the cardinal principle of U.S. foreign policy barring any unilateral act(s) that could prejudge the outcome of future negotiations between the contending parties and cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict. As President Bush stated on May 23, 2006, "any final status agreement will be only achieved on the basis of mutually agreed change, and no party should prejudice the outcome of negotiations on a final status agreement . . . ."

Within the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel. It was within this highly charged context that enactment in 2002 of Section 214 of the Foreign Relations Authorization Act, FY 2003, purporting to require reversal of this longstanding policy,

provoked strong reaction throughout the Middle East, even though the President in his signing statement said that the provision would not be construed as mandatory and assured that "U.S. policy regarding Jerusalem has not changed." Upon its enactment, Palestinians from across the political spectrum strongly condemned all four Jerusalem provisions under Section 214. The PLO Executive Committee, the Fateh Central Committee and the Palestinian Authority cabinet issued statements harshly critical and asserting that it "undermines the role of the U.S. as a sponsor of the peace process." The Speaker of the Palestinian Legislative Council issued a statement that the law was "an unprecedented undervaluing of Palestinian, Arab and Islamic rights in Jerusalem" that "raises questions about the real position of the U.S. Administration vis-à-vis Jerusalem." Numerous political personalities issued statements condemning the law. For example, Nabil Shaath, the Palestinian Authority's planning and international co-operation minister at the time, was quoted in the press as saying the move was "an act against peace, an act of incitement." The Financial Times Limited, Financial Times (London, England), October 2, 2002 Wednesday, London Edition 1, "US ruling on Jerusalem takes Arabs by surprise – Foreign Policy New Law Recognises City as Israeli Capital;" Byline: James Drummond and Richard Wolffe; Dateline: Cairo and Washington.

As further observed in contemporaneous press accounts, "The international community does not recognize Jerusalem as the capital of the Jewish state. Arab nations have warned that any American

move to recognize it as Israel's capital would severely harm relations between the Arab world and the United States." 2002 SOFTLINE INFORMATION, INC., Ethnic NewsWatch, October 4, 2002; Section: Vol. CVI; No. 31; Pg. 6; Headline: Bush, Lawmakers Clash Over Status of U.S. Consulate in Jerusalem; Byline: Nir, Ori. In line with this, it was further reported that "An official with a Jewish organization in Washington who is familiar with the drafting of the bill said that the provisions were intended not only to reaffirm the American commitment to recognizing Jerusalem as Israel's capital, but also to "downgrade the relationship between the Palestinians and the U.S." Id.

From a foreign policy perspective, regardless of whether "Israel" or "Jerusalem, Israel," were to be recorded as the place of birth for a person born in Jerusalem, such a reversal of U.S. policy on Jerusalem's status would be immediately and publicly known, as was the enactment of Section 214 in 2002. The implications would be equally adverse and dramatic. We would expect those groups that have advocated strenuously for legislation to compel the foreign policy change would tout the reversal as a political victory in public discourse. Similarly, those groups likely to be critical of any U.S. policy change that could be perceived as prejudging final status issues could be expected to condemn such a decision. As a practical matter, publication that the United States had begun to designate "Israel" to record births outside internationally recognized territory of Israel could provoke greater scrutiny and travel delays in some countries for any American

travelers bearing a passport noting "Israel" as the place of birth, regardless of whether they were born in Jerusalem or areas of Israel not subject to international dispute.

Furthermore, the reversal of United States policy not to prejudge a central final status issue could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans aboard.

6. Have there been any governmental or private studies, surveys or published materials discussing the foreign-policy consequences of listing "Israel" as the place of birth of United States citizens born in Jerusalem? Please identify any such materials and produce copies thereof.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The Department has considered over the years the impact of listing "Israel" as the place of birth of United States citizens born in Jerusalem in the context of its overall Middle East policy and has concluded that such listing or designation would be interpreted as an official act of recognizing Jerusalem as being under Israeli sovereignty. The Department is not aware of any published studies of the consequences specifically of listing "Israel" as the place of birth of U.S. citizens born in Jerusalem. There is extensive literature, however, on the international community's insistence that the status of Jerusalem be resolved through negations rather

than unilateral acts. The Department is producing a collection of related U.S. government positions dating from about 1948 that have been published in various Department of State publications or otherwise officially released.

7. Describe how the place of birth of a United States citizen shown on that citizen's passport is or may be relevant to a foreign-policy determination made by a foreign sovereign.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: *See* response to Interrogatory 5, *supra*.

8. Has any foreign government or any foreign diplomat or representative of a foreign government ever made a formal complaint or any other adverse remark to the United States or any representative of the United States over the designation of a "place of birth" in a passport? If so, describe the circumstances under which the complaint was made.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: Although the Department does not maintain records in a manner that would facilitate identification of responsive information, the Department's search and review of documents is ongoing, and this response will be supplemented as appropriate. The Department further responds by incorporating by reference its response to Interrogatory 5, *supra*.

9. Has the United States or any representative of the United States ever made a formal complaint or any other adverse remark to a foreign government or any representative of a foreign government over the designation of a "place of birth" in a foreign passport? If so, describe the circumstances under which the complaint was made.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: Although the Department does not maintain records in a manner that would facilitate identification of responsive information, the Department's search and review of documents is ongoing, and this response will be supplemented as appropriate.

10. Do any printed materials or documents issued by (a) the Department of State, (b) any other agency of the United States government, or (c) any governmental agency of any State or any municipality in the United States contain the words "Jerusalem, Israel"? Identify such documents.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Department responds to part (a) as follows: The Department has no reasonable means of searching its hard-copy materials to determine whether any are responsive to this Interrogatory. An electronic search of the Department of State Internet, Intranet and FirstGov sites identified the following electronic documents as then containing the words "Jerusalem, Israel."

http://www.state.gov/m/a/os/c_16488_htm.

http://www.osac.gov/Posts/index.cfm?display=post&postID=1101

http://www.state.gov/mla/os/5_7775.htm

http://arpsdir.a.stat.gov/fam/04fah01_/04fah010430.doc

http://arpsdir.a.stat.gov/fam/04fah01_/04fah010310.doc

http://www.state.gov/m/a/os/c_16488.htm

http://www.state.gov/secretary/former/powell/remarks/2001 /3 808.htm

http://usinfo.stat.gov/xarchives/display.html?p=washfile-english&y=2003&m=Janaury&x=20030102082216bjohnson@pd.state.gov0.3441126&t=xarchives/xarchitem.html#top

http://usinfo.state.gov/mena/Archive/2004/Feb/05-90763.html#top

http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=October&x=20031001162346ifas4.261416e02&t=xarchives/xarchitem_html#content

http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=January&x=20050110125146lcnirellep0.8246881&t=xarchives/xarchitem.html#content

http://dsu200w2ka30.ds.state.gov/pls/portal/docs/PAGE/DSWEB/DSDSS/IP/IP_RESOURCES/EXTERNAL%20RSO%20TELEPHONE%2010-28-04.PDF

http://arpside.a.stat.gov/fam/04_fahO1t1003 5.doc

Some of these entries have already been corrected and the Department is pursuing the correction of the remainder to the extent feasible to assure conformity with official U.S. government policy.

11. Have Consular Reports of Birth Abroad been issued in Jerusalem or in Tel Aviv identifying the place of birth of a United States citizen as "Jerusalem, Israel"? See Exhibit 4. State the number of such documents and the circumstances of their issuance.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: No correctly issued Consular Reports of Birth Abroad for U.S. citizens identify "Jerusalem, Israel" as the place of birth; however, the Department is aware that errors have been made and is taking steps to correct these errors and to ensure that such errors are not repeated.

A computer search of Department databases from 1998 to the present followed by comparison with hard copies of relevant certificates has identified seven individuals (one in 1999, one in 2001, one in 2002, one in 2004, and three in 2005) to whom Reports of Birth were issued in error, mistakenly listing the place of birth as "Jerusalem, Israel." The Department will be providing copies of these

certificates after excising the names and identifying information in accordance with the Privacy Act. The Department has insufficient information to explain the circumstances of their issuance or the cause of these errors.

The following chart reflects the numbers of Reports of Birth issued per year beginning in 1998, as reflected in the American Citizens Services database (ACS Plus system). The figures for 1998 are incomplete as the ACS system was then being deployed. It would be unreasonably burdensome to manually search pre-1998 files for responsive information. Of these totals, only the 7 cases noted above have been determined to include mistakes relating to the birthplace of Jerusalem.

Post	1998	1999	2000	2001	2002	2003
Jerusalem	382	1,675	1,510	1,328	1,336	1,487
Tel Aviv	0	290	426	797	690	393
Total	382	1,965	1,936	2,125	2,026	1,880

Post	2004	2005	2006
Jerusalem	1,954	2,092	706
Tel Aviv	422	451	163
Total	2,376	2,543	869

12. Have Consular Certificates of Death Abroad of United States citizens issued in Jerusalem or in other cities of Israel identified the place of death as "Jerusalem, Israel"? See Exhibit 5. State the number of such documents and circumstances of their issuance.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: No correctly issued Consular Certificates of Death Abroad for U.S. Citizens identify "Jerusalem, Israel" as the place of death; however, the Department is aware that errors have been made, including one individual in the year 2000, three in the year 2003, and one in the year 2004 for whom the place of death was listed as "Jerusalem, Israel." The Department will be providing copies of these certificates after excising the names and identifying information in accordance with the Privacy Act. The Department has insufficient information to explain the circumstances of their issuance or the cause of these errors. The Department, however, has taken steps to issue corrected copies to the next of kin of these individuals and to ensure that such errors are not repeated in the future.

ACS Plus reflects the following total reports of death issued by Embassy Tel Aviv and the Consulate General in Jerusalem beginning in 1995, out of which only the 5 cases noted above have been determined to include mistakes in the place of death relating a death in Jerusalem:

POST	1995	1996	1997	1998	1999	2000
Jerusalem	1	1	0	1	23	55
Tel Aviv	1	1	0	0	2	3
Total	2	2	0	1	25	58

POST	2001	2002	2003	2004	2005	2006
Jerusalem	38	59	60	39	26	2
Tel Aviv	14	13	12	11	4	0
Total	52	72	72	50	30	2

It would be unreasonably burdensome to manually search pre-1995 files for responsive information.

13. Name all currently living individuals ever employed by the United States Government who participated in any manner in the formulation of the content, design, and format of United States passports and provide, for each person, the current or last-known place of employment, residence address, telephone number, and e-mail address.

RESPONSE: Defendant specifically objects to this Interrogatory to the extent it seeks information protected by the Privacy Act. Subject to this specific objection and the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The content, design and format of U.S. passports reflect standards developed by the International Civil Aviation Organization (ICAO), involving numerous U.S. government delegations over the years supported by many individuals unknown at this time. The design of the data fields of the passport's biographic page confirms to the guidelines recommended by ICAO's Technical Assistance Group. Furthermore, the passport reflects input and efforts of U.S. government experts and supporting personnel on issues of security measures, fraud prevention, privacy and travel facilitation. It is impossible to

indentify all of the individuals who participate in these processes.

The United States Department of State Bureau of Consular Affairs' Office of Passport Services (CA/PPT), currently under the leadership of Deputy Assistant Secretary Frank Moss, is responsible for developing designs of the United States passport for the approval of the Secretary of State. Herein, "designs" includes all materials, imagery, security features, manufacturing processes and rights created for and in use by the passport.

The passport construction is based in part on specifications developed by the Government Printing Office (GPS)'s Scientific and Intelligent Documents Division. Personnel at the Department of State are engaged in issues from paper testing to fraud prevention. The inks used in the printing process are also developed with the participation of GPO, CAIPPT and the Forensic Document Laboratory (FDL). Decisions relating to printing specifications and procedures involve GPO's Creative Services Division, the Department's Passport Office and Fraud Prevention Program, and the Bureau of Engraving and Printing (BEP).

Further decisions made within the Department relate to personalizing books for specific applicants, which involves outside suppliers under Department contracts, involving Department procurement personnel and the Passport Office's Information Management Liaison.

Notwithstanding the general and specific objections, the Defendant responds that within the Department of Stat's Bureau of Consular Affairs:

(i) the Deputy Assistant Secretary for Passport Services is Frank Moss;

(ii) the Biometric Advisor is JoAnne Arzt;

(iii) the Executive Director is Matthew Klimow;

(iv) the Director of the Consular Systems Division is Travis Farris;

(v) the Director of the Office of Fraud Prevention Programs is David Rollman; and

(vi) the Project Manager for Passport Design in Passport Services is Keith Bruce.

14. Name all currently living individuals ever employed by the United States Government who participated in any manner in the drafting, revision, or approval of 7 FAM 1383.5-4, 7 FAM 1383.5-5, and 7 FAM 1383.5-6 and provide, for each person, the current or last-known place of employment, residence address, telephone number, and e-mail address.

RESPONSE: Defendant specifically objects to this Interrogatory to the extent it seeks information protected by the Privacy Act. Subject to this specific objection and the General Objections and based on Defendant's understanding of this Interrogatory,

Defendant responds as follows: 7 FAM 1383.5-4, 7 FAM 1383.5-5, and 7 FAM 1383.5-6 were drafted and revised by the late Mr. George Scanlan, an employee of the Department of State, Bureau of Consular Affairs, Overseas Citizens Services. 7 FAM 1383.5-4, 7 FAM 1383.5-5, and 7 FAM 1383.5-6 were approved by Mr. Carmen DiPlacido, Director of the then Office of Citizens Consular Services in the Directorate for Overseas Citizens Services in the Bureau of Consular Affairs and by Mr. William Wharton, Director of the Office of Citizenship Appeals and Legal Assistance in the Directorate of Passport Services, Bureau of Consular Affairs. Mr. DiPlacido and Mr. Wharton are both retired employees of the Department of State.

15. (a) Describe how United States citizens encountering emergencies in foreign countries are identified in cables sent to United States posts by the Office for Overseas Citizens Services.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: United States citizens encountering emergencies in foreign countries are identified in cables sent to U.S. posts abroad by the Directorate for Overseas Citizens Services by their name, date, and place of birth.

(b) Is the "place of birth" of a United States citizen specified in a passport a means of identifying the citizen in messages sent to and from United States embassies, consulates and other posts?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The "place of birth" information contained in a passport of a U.S. citizen is included for identification purposes, among other reasons, in messages sent to and from U.S. embassies, consulates, and other posts.

16. What purpose, other than personal identification of the citizen, is served by the specification of the "place of birth" of a United States citizen in the citizen's United States passport?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case tracking system.

17. If a "city or town of birth" is chosen pursuant to 7 FAM 1383.5-4, may the applicant list the Arab name of the city or town if that name differs from the Israeli name of the city or town?

RESPONSE: Defendant specifically objects to this Interrogatory as outside the permissible scope of discovery. Subject to this specific objection and the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: In accordance with Department policy, place names should conform to the place names used by the U.S. Board of Geographic Names (*see* www.NGA.mil).

CERTIFICATION

I, Catherine Barry, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that I have reviewed the foregoing responses to Interrogatory Numbers 1-4 and 6-17 and certify, based on personal knowledge and information provided to me in my official capacity, that they are true and correct to the best of my knowledge, information and belief.

/s/
Catherine Barry
Deputy Assistant Secretary
for Overseas Citizens Services
Bureau of Consular Affairs
United States Department of State

CERTIFICATION

I, Thomas E. Williams, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that I have reviewed the foregoing response to Interrogatory Number 5 and certify, based on personal knowledge and information provided to me

in my official capacity, that they are true and correct to the best of my knowledge, information and belief.

/s/
Thomas E. Williams, Director
Office of Israel and Palestinian Affairs
Bureau of Near Eastern Affairs
United States Department of State

Respectfully submitted as to the Objections,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,
Plaintiff,

No. 03-CV-01921 (GK)

v.

THE SECRETARY OF STATE
Defendant.

DEPOSITION OF CATHERINE BARRY
Washington, D.C.
Tuesday, August 8, 2006
2:47 p.m.

Job No.: 1-84023
Pages: 1 85
Reported by: Sarah M. Bickel
Deposition of CATHERINE BARRY, held at the offices of:

DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

Pursuant to agreement, before Sarah M. Bickel, Court Reporter and Notary Public in the District of Columbia.

* * *

[6] CATHERINE BARRY having been first duly sworn, testified as follows: EXAMINATION BY COUNSEL FOR PLAINTIFF BY MR. LEWIN:

* * *

[13] Q What is the -- is it a department or division of Overseas Citizen Services, what does it do?

A The Office of Overseas Citizen Services basically tries to help American citizens who are overseas. Some of those services that we provide are routine services such as the issuance of passports, reports of birth. Some of them are emergency services such as helping those who are destitute be repatriated to the United States, visiting those who get arrested and detained, and in most recently helping evacuate people out of harm's way out of Lebanon.

Q Back in my day I guess it was called Special Consular Services, is that what it was?

A To some degree people still use that term.

* * *

[16] Q Let's get then to the first subject that is in those interrogatories, pages 2 and 3 of the responses to interrogatories in which the defendant was asked when place of birth or its equivalent was first made a part of the U.S. passport and why that was done. The answer towards the bottom of page 2 [17] says it was first added in 1917 and you have not located any document identifying the initial reason for including this information. Have you, since the

time of this interrogatory was prepared, found any other -- any document that would supplement that in any way, that would indicate why place of birth was put on there?

A We have found no additional information relating to that time period.

* * *

[18] Q Now, the page that's numbered 69 in exhibit 3 has a sample of a format of the passport as of March 22, 1926. Do you see that?

A Yes.

Q It's true, is it not, that on the right-hand side of that format of the passport appears description of bearer, is that correct, at [19] the bottom right-hand side?

A Yes, it does.

Q And it lists height, which in this case was 5 feet 10 inches, hair, eyes, distinguishing marks or features, place of birth, date of birth, and occupation. You see that?

A Yes, I do.

Q From your review of the historical records concerning the format of the passport, was this the first form in which a place of birth and date of birth was placed in a passport?

A It is the first form that we found in our records search.

Q That was, was it not, under -- placed in the passport under the words description of bearer; is that correct?

MS. COLEMAN: Object to form. You may answer.

BY MR. LEWIN: Q You may answer. That was placed in the past under the words "description of bearer"?

A It is placed under the description of [20] bearer.

Q Is it fair to say, Ms. Barry, that the date and place of birth was viewed from the time that the passport had originated on a passport as part of the description of the person who was carrying the passport?

MS. COLEMAN: Object to form. You may answer.

THE WITNESS: Would you rephrase that, please?

MR. LEWIN: Can you just read that part?

(The reporter read the requested portion of the record.)

THE WITNESS: I can state that in this particular format of the U.S. passport the data field, place of birth appeared under the words "description of bearer".

* * *

[21] Q Is it true to this day that an American citizen abroad, within the range of your duties as director of the office of overseas citizens services, is described by his date -- his or her date of birth and place of birth?

MS. COLEMAN: Object to form.

THE WITNESS: In my line of work we refer to American citizens as a matter of their identity with their name, their date of birth and their place of birth.

[22] Q Let me mark this as Barry Exhibit 4.

(Barry Exhibit No. 4 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q I place before you Barry Exhibit No. 4. That's the response to our request for admissions. Were you involved in the preparation of that response?

A Yes, I was.

Q That didn't have to be signed by you but it was signed by counsel but you worked on it; is that correct?

A Yes, I -- yes.

Q So that the responses to the request for admissions were to use the State Department term, cleared with you?

A Yes.

Q Looking at a request for admission number 1, we asked the defendant to admit that United States citizens traveling in foreign countries are routinely identified in messages sent to and from the [23] Department of State from name, date of birth, and place of birth and your response was subject to the general objections and based on defendants' understanding, defendants responds as follows: Admits. So that submitted in the request for admissions and that was with your approval?

A Yes, I concur with that.

Q What other reasons are there for having a place of birth on a passport besides the identification of the passport bearer?

A For the U.S. government the place of birth is an element that helps us identify someone and that is the principal reason we use place of birth.

Q Is there any other reason why place of birth is stated or requested from the applicant to be information so it would appear on a passport? Is there any other reason?

A That is why it is included in the passport.

Q As a means of identification?

A As a means of identification.

Q Again, not to belabor the point, there is [24] no other reason that you can think of as to why it's included?

A As to why it is included it is an element of identification.

Q Right. There are -- had there been any times in the past where the Department of State has considered dropping or eliminating the need for having place of birth on a U.S. passport?

A Yes, the Department did consider that question.

Q When did it do so?

A The Department of State formally considered that question in, I believe, 1977.

Q How did that happen? Why did the Department of State consider that?

A The Department of State considered the question because of some concerns expressed by individual citizens that they may experience political harassment because of a particular place of birth that may appear on their passport.

* * *

[25] BY MR. LEWIN: Q Was it also true that in fact Congress requested a report on whether place of birth should be eliminated from a passport?

A That is true. In 1986 I believe it was Congress asked the GAO to look at the question.

Q Did the Department of State do anything in response to that request from Congress?

A The Department of State cooperated with the GAO's review of the question.

Q Did it in fact send out inquiries to foreign governments to find out how they would react to the elimination of place of birth on a passport?

A My recollection of the documents that we [26] reviewed in discovery is that the department independently had surveyed some countries and shared the results of that with the GAO.

Q I don't mean to be in any way, you know, trying to impede your question of what you're saying, isn't it true that some of the cables specifically referred to the fact that Congress had made this request, some of the cables to foreign posts asking them for inquiry -- to inquire about what would be the consequence if the United States government dropped the place of birth on a passport? Do you recall that?

A I don't remember all the details.

Q What were the -- were their responses to

these questions that asked the foreign governments who said that they would not object to the elimination of place of birth on a passport?

MS. COLEMAN: Object to form.

THE WITNESS: Would you rephrase that, please or repeat it.

BY MR. LEWIN: Q Pardon?

[27] A Would you repeat the question?

Q Were there foreign governments that said that they would not object to eliminating the place of birth on a passport?

A My recollection is that some governments took that position.

Q Is it not true that the Austrian government, for example, said that they have eliminated on their own from their passport, they eliminated place of birth on a passport, do you recall that?

A I recall that that was what they said at that time, 1986.

Q There was a General Accounting Office report, was there not, on the implications of deleting the birth place in the U.S. passports?

A Yes, there was.

* * *

[30] BY MR. LEWIN: Q You know, Ms. Barry, that the issue in this particular case is whether United States citizens born in Jerusalem may have their U.S. passports show them as born in Israel rather than being born in Jerusalem, is that correct? You understand that that's the issue?

MS. COLEMAN: Object to form.

THE WITNESS: I understand that the issue is how the place of birth should be designated for someone in Jerusalem.

BY MR. LEWIN: Q How is that designated today under State Department regulations, a U.S. citizen born in Jerusalem?

A The State Department regulations instruct U.S. Consular officers and U.S. passport adjudicators to use the word Jerusalem to indicate the birth, place of birth for an American citizen born in Jerusalem.

[31] Q The alternative would be to state a country, correct, to state Israel if that's what the parent or whoever applies for the passport requests would be to state a country and not a city; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: I'm not -- I don't understand your question. Are you talking about Jerusalem or --

BY MR. LEWIN: Q I'm talking about Jerusalem instead of passport saying Jerusalem. What else would it say?

A The present instructions say there is no other option. It must say Jerusalem.

Q In the case of American citizens born abroad, what is the usual designation of a place of birth, is it a city or a country?

MS. COLEMAN: Object to form.

THE WITNESS: The instructions state that the norm for American citizens born overseas is to use the country of birth.

* * *

[33] BY MR. LEWIN: Q Can there be on a passport a designation of a place of birth of a country other than a country that is recognized by the United States? Again, I don't want to make this either a test or appear to be doing something that's tricky in any way. I'm just asking you isn't it a fact that the passport regulations authorize the issuance of a passport with names other than a city or a recognized country?

MS. COLEMAN: Object to form.

[34] THE WITNESS: I guess I'm confused what you mean by recognized. Recognized by the list that we have in our --

BY MR. LEWIN: Q No, I mean recognized by the United States in the country. Is there a country called Gaza?

A Are you talking about diplomatic recognition?

Q Yes, I'm talking about yes, international diplomatic recognition.

A Then yes, there are place names that will appear in the U.S. passport for territories that are not -- do not have full diplomatic recognition by the U.S. Government.

Q A passport can be issued for somebody and the person says I would like it to say Gaza, it will be issued for Gaza; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: If someone was born in territory that is now known as the Gaza Strip, then the passport for place of birth will say, I believe, Gaza Strip.

[35] BY MR. LEWIN: Q But there is no country called Gaza Strip?

A That's why I used the word "territory".

Q But you would agree with me there is no country called Gaza Strip? You agree there is no country called Gaza Strip? I'm asking a very simple question.

A Yes, I would agree there's no country called Gaza.

Q Someone is born in the area that may properly be called the West Bank. Would the passport be issued for West Bank?

A The procedure is for someone born in the West Bank to be issued a passport that would say West Bank. There is, I believe, one exception, those born prior to 1948.

Q What is the exception in regards to people born prior to 1948.

A They may ask to have Palestine listed.

* * *

[36] Q Why don't you tell us in your own words what is the reason why the State Department will not allow a person who is born in Jerusalem to designate his place of birth for purposes of a passport as Israel?

A The State Department uses the term "Jerusalem" for place of birth for those born in Jerusalem because it is an a place whose legal status has not been fully determined.

[37] Q Is it your testimony that where the legal status is fully determined, then the State Department will insist that that area be designated as the place where the legal status is fully determined?

A I did not make a general statement, I responded only with regard to Jerusalem.

* * *

[38] Q Have you to this day found any instance of a representative of the United States ever making a formal complaint or any adverse remark to a foreign [39] government or any representative of a foreign government over the designation of a place of birth in a foreign passport?

A Yes, we have.

Q What is that?

A I believe in discovery we found two examples, relating to Kuwait and relating to Chile.

Q Pardon?

A Relating to Kuwait and relating to Chile in which the U.S. Government expressed a complaint.

Q Could you just describe what they were, Kuwait and Chile?

A In both instances the passport issuing authorities were allowing those who had become naturalized citizens to list place of birth as being within Kuwait or Chile instead of their actual place of origin.

Q So those with cases, with a place of birth was in inaccurate, it was not really the place where they were born; is that correct?

A That is correct.

Q They were places where the individuals [40] were naturalized but not where they were born, so the actual statement is this where you were born or is this a place of birth was false?

A That's correct.

Q Have you in the course of any further discovery found any instance in which a representative of the United States made a formal complaint or any other adverse remark to a foreign government or any representative of a foreign government over the designation of a place of birth in a foreign passport that was an accurate or true representation of the place of birth but in some way stated a location that was not internationally recognized or a country that was not inter-nationally recognized?

MS. COLEMAN: Object to form.

THE WITNESS: We have no such example.

BY MR. LEWIN: Q Question 8 in the interrogatories asked whether any foreign government or any foreign diplomat or representative of foreign government ever made a formal complaint or any other adverse remark [41] to the United States or any representative of the United States over the designation of a place of birth in a passport. The response again as of the time that the interrogatories were submitted stated that the department does not maintain records in a

manner that would facilitate the identification of responsive information but that the search and review of documents is ongoing and the response will be supplemented as appropriate in the course of any further discovery. Did you find any instance in which a foreign government ever made a formal complaint to the United States over the designation of a place of birth in a passport?

A Yes, we did.

Q Which were those?

A We found instances where the German Democratic Republic had objected.

Q In that case the German Democratic Republic objected because the United States passport simply said Germany instead of German Democratic Republic; is that correct?

[42] A That is correct.

Q In fact, what was the response of the United States Department of State to that?

A The response was to explain our policy for listing Germany as place of birth.

Q Go ahead.

A That's it.

Q And to retain the policy as it had been previously; is that correct?

A Yes, that would have been retaining the previous policy.

* * *

[43] Q With regard to American passports that show the American citizens as being born in Israel, I believe if you'll turn to page 5 of your answers to the interrogatories your ten year count shows 80,769 passports having been issued in the past 10 years with passport holders identified as being born in Israel; is that correct?

A Yes.

Q Just explain to me, next to that is a column which says five year count. That's within the past five years, is that what that is?

A No, passports issued to children are only issued for a validity period of five years.

Q I see. So by five year count you mean passports valid for five years?

A (Witness nodded head.)

Q So that the total number of passports issued in the ten years, these past 10 years to American citizens showing them born in Israel is 99,177. Does that include those individuals who have chosen to have their passports say either cities that are within Israel or have them say Palestine because [44] they were born before 1948 or are these only those where the passport says Israel?

A My understanding of the data is that these are the passports that said Israel.

Q That say the word "Israel" in the passports?

A In the data field "place of birth" it said Israel.

* * *

[49] BY MR. LEWIN: Q Can you just tell me in what way complying with that law would in any way affect the interests of the United States?

MS. COLEMAN: Object to form.

THE WITNESS: That question has been answered in our interrogatories, number five where we have expressed.

BY MR. LEWIN: Q It's an awfully long answer. It goes into the history of Jerusalem. Let me then ask you, if an American citizen crosses a border with a passport that says Israel, even though he is born in Jerusalem, how does anybody know that he was born in Jerusalem, how does it affect the American foreign policy in any way?

MS. COLEMAN: Object to form.

[50] THE WITNESS: Our answer to the foreign policy issues is in our answer to the interrogatory number five.

BY MR. LEWIN: Q Can you summarize that in some way?

A I stand by the answer in number five.

Q Then let me ask you another question, then. You've described the fact that the place of birth is a means of identification. Is there any way that the means of identification of an American citizen is in any way impaired or reduced or affected in any way if that citizen's passport says Israel rather than saying Jerusalem?

MS. COLEMAN: Object to form.

THE WITNESS: Would you repeat that, please?

(The reporter read the requested portion of the record.)

THE WITNESS: I don't know that I could give you a general answer to that. I think it would depend on the facts of the specific case.

BY MR. LEWIN: [51] Q Ms. Barry, you -- when you send out a message about an American citizen abroad I think you testified you identify that citizen by date of birth, place of birth. Right now American citizens who have Jerusalem on their passport, it has their date of birth and then it says Jerusalem. If you were to identify them in the future by date of birth and Israel rather than saying Jerusalem, would that in any way impair the ability to identify those citizens?

MS. COLEMAN: Object to form.

THE WITNESS: This is what I understand of your question. As I identify them for the purposes of U.S. government services, we identify them by date of birth and place of birth according to the guidance of the Department of State. So in terms of our relations with our citizens, I don't see that they would be -- anyway, our relationship with our citizens is informed by the guidance of the United States government. I don't see a harm to them.

* * *

[57] about all the errors there, but never to write Jerusalem, Israel?

A I was instructed according to the language of seven FAM.

Q Does that have to do -- seven FAM has to do with how a passport is to be you know, place of birth on a passport, but this goes beyond that, doesn't it? This goes to never, ever, ever, ever write Jerusalem, Israel on any document. Were you instructed when you were in the post in Jerusalem you should never write the words Jerusalem, Israel on any document?

MS. COLEMAN: Object to form. Counsel, this is certainly beyond the notice. The notice is specific to passports. You're now asking beyond passports.

BY MR. LEWIN: Q This does have to do with a consular report about birth abroad, correct?

A The second to the last sentence is consular report of birth.

Q And a passport application?

* * *

[58] Q Had there been certificate – consular reports of births abroad issued in Jerusalem which did say Jerusalem, Israel?

A The discovery process found a few that had been issued in error.

[59] Q What have you done with regard to those?

A We have corrected the clerical error.

Q How did you correct the clerical error?

A We corrected the document and provided a corrected document to the individual.

Q Can you explain how a consular report of birth abroad can have any foreign policy application whatever?

MS. COLEMAN: Object to form.

THE WITNESS: We have explained the foreign policy implication to our answer is to interrogatory No. 5.

Q Who gets a consular report of birth abroad?

A The department -- the consular officers provide a copy to the individual, for the individual's parents.

Q From your experience in your review of the history in preparing for this deposition, what use is made of a consular report of birth abroad by the parent?

A The general use is to have a document that [60] certifies their birth for U.S. purposes.

Q In order to prove that back home in the United States, isn't that true?

A For the most part, yes, that's true.

Q So people go back to their home states and they get a birth certificate for their child based on the consular report of birth abroad; is that correct?

A No, I don't believe that's correct. I believe they just use the certificate of birth abroad.

Q But they can if they –

A I don't know. It's state law. I would have no knowledge.

Q But they would naturally use it for personal reasons like getting a driver's license or showing that you're a certain age in terms of starting school or something like that; is that right?

MS. COLEMAN: Object to form.

BY MR. LEWIN: Q In the United States?

A That is probably how the individuals use [61] it.

Q To your knowledge, is a consular report of birth abroad shown to a foreign government?

A The specific document issued by the Department of State is not generally shared with foreign governments.

Q Again, the issue in these situations or in this case is whether the consular report of birth abroad would say that the individual was born in Israel, wouldn't necessarily have to say Jerusalem, Israel, would it?

MS. COLEMAN: Object to form.

THE WITNESS: I can't answer that.

BY MR. LEWIN: Q Do you know whether the Department of State here in Washington, D.C. has issued passports to American citizens born in Jerusalem that have said that they were born in Israel?

A My recollection is two examples were found during discovery.

Q How did that happen? How did those two examples happen?

[62] MS. COLEMAN: Object to form. I instruct the witness not to answer to the extent that --

MR. LEWIN: Pardon?

MS. COLEMAN: I said I object to form and I instruct the witness not to answer to the extent it calls for information protected by the Privacy Act.

MR. LEWIN: All right.

BY MR. LEWIN: Is there any information you can provide apart from information protected by the Privacy Act which would explain how come the State Department issued passports to individuals born in Jerusalem that said that they were born in Israel?

A The State Department's determination is that the two passports were issued as a matter of clerical error.

Q What have you done with regard to that clerical error?

A Our standard practice when we find that a passport contains a clerical error is to correct the error when the passport -- when the renewal of passport is requested. If the recipient of the [63] passport notices the error and brings it to our attention, then it is corrected at that time, but if the individual does not notice that there's an error, then we normally make a record of the fact that there is an error and we, as I say, we correct it at a later date when the passport is renewed.

Q Can you give me an example of any other error that the State Department has noticed on a passport that it attempted to correct against the wishes of the passport holder?

MS. COLEMAN: Object to form and I instruct the witness not to answer to the extent it calls for information protected by the Privacy Act.

BY MR. LEWIN: Excluding information. Has there been to your knowledge any other instance in which the Department of State has attempted to correct an error -- start off with place of birth and maybe they'll expand that later, but on a place of birth on a passport against the wishes of the passport holder, not requested by the passport holder?

MS. COLEMAN: Same objections.

[64] THE WITNESS: I don't have personal knowledge. We now issue over 10 million passports a year, so I do not have sufficient personal knowledge.

BY MR. LEWIN: Q I understand that, but even in terms of preparing for this deposition and preparing the interrogatories did you come across any other case where and again, I don't want the names, I don't want anything that violates the Privacy Act, any other case in which the Department of State has said we will change a person's place of birth -- you viewed that as a "clerical error" -- we will change it even though the person has not requested

that it be changed. Is there any other case that you came across?

A I simply don't know.

Q I guess the answer to that question is no, you didn't come across any other case. That's all I'm asking.

A I don't know to what degree a search was done which would have been relevant to that question.

Q But you did nothing -- nothing was brought [65] to your attention, no case was brought on to your attention of that kind?

A As I said, I don't know that any search was done.

Q It's true though that in this case with regard to these two passports that you say were issued in error, the passport holders were not asked whether they want to have that clerical error corrected. The passport office decided all on its own that they would view this as a clerical error and make that change?

MS. COLEMAN: Object to form.

THE WITNESS: As I said, the practice is -- the standard practice is to make a note in our files that there's an error that needs to be corrected and then when the passport renewal is sought, to make the correction at that time. That would mean that

the -- there's an opportunity to inform the applicant that there is an error and that the department would be correcting it.

* * *

[67] THE WITNESS: I would like to correct my answer because I spoke, I told you -- I gave you the names of two countries, Kuwait, Chile and I was mistaken. It was not Kuwait, it was United Arab Emirates rather than Kuwait, but the rest of my answer I stand by.

BY MR. LEWIN: Q United Arab Emirates was listing as -- born in Arab Emirates people who are not born in the United Arab Emirates?

A Who were naturalized citizens of the United Arab Emirates and who in some instances had not been born there, but were listed on their passport as having been born there.

Q Thank you. Let me mark as the next Barry exhibit these few pages which are Bates stamped 1190 to 1193 in the production given to us.

(Barry Exhibit No. 9 was marked for identification and attached to the deposition [68] transcript.)

BY MR. LEWIN: Q Specifically I will direct your attention to page 1193, which is the last of those pages. That was a letter written by Ambassador McCloskey to a congressman, to Congressman Koch, K-O-C-H, from 1976 in which he stated in the second paragraph that the policy of the

passport office to include that the place of birth in a passport follows international custom and conforms with the recommendation of the United Nations committee to facilitate international travel on the international civil aviation organization.

And then the next paragraph says in the second sentence, speaking of a place of birth, it serves as identification widely accepted in international circles.

So is that your understanding that the place of birth is an identification widely accepted in international circles?

MS. COLEMAN: Object to form.

THE WITNESS: I agree that the place of [69] birth does serve as identification and it's used as an identifying element is widely accepted under international custom.

* * *

[72] BY MR. LEWIN: Q Let me show you then what I'll mark as Barry Exhibit No. 12.

(Barry Exhibit No. 12 was marked for identification and attached to the deposition 12 transcript.)

BY MR. LEWIN: Q Prior to the time that Congress passed legislation relating to the listing of Taiwan as the place of birth on U.S. passports, wasn't it true that the Department of State did not

permit Taiwan to be issued -- to be listed on a U.S. passport as a place of birth?

A Yes, that is correct.

Q Looking at that exhibit dated November 7, 1994, it says that recently passed U.S. legislation [73] now permits the listing of Taiwan as a place of birth on U.S. passports. So that happened because of congressional legislation; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: I do not know that. The statement doesn't express why, it simply says that there was legislation.

MR. LEWIN: Let me show you then what I will mark as Exhibit 13.

BY MR. LEWIN: Q In 1994 where were you within the --

A In 1994 I was in the operations center as director of the operations center.

Q And that would include November 1994?

A Yes, it would.

(Barry Exhibit No. 13 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q Showing you Exhibit 13, that is a passport bulletin; is that correct?

A Yes, it is.

[74] Q What is a passport bulletin?

A A passport bulletin is an instruction to the employees of passport services.

Q That passport bulletin directed passport offices to list Taiwan if a United States citizen requested that listing as a place of birth because of public law 103-415; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: I would say that this document gives two reasons for the change in instruction. One reason is the change in law that you mentioned, the other reason is contained at the bottom of the page talking about the United States recognition of the government of the People's Republic of China as the sole legal government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China.

BY MR. LEWIN: Q So what you just read is a reason why the United States was saying it would not previously recognize Taiwan as a designation on a passport. [75] What you've just read says that notwithstanding the fact that Taiwan is not recognized by the United States as a separate entity, nonetheless, because of the law, Department of State

personnel are directed that they should place Taiwan on a U.S. passport at the request of the passport holder, isn't that true?

MS. COLEMAN: Object to form.

THE WITNESS: I read this statement as saying the United States government and the government of the People's Republic of China have the same view of the status of Taiwan.

BY MR. LEWIN: Q Look at the third paragraph right number where it says birthplace codes.

A Yes.

Q That says: Please note that although issuing offices may now enter Taiwan as a place name in the computer birthplace code table, the United States does not officially recognize Taiwan as a state. That says that the United States does not recognize Taiwan and continues not to recognize Taiwan; is that correct?

[76] A That's correct.

Q And nonetheless, because the law was enacted, the passport offices were instructed that they should issue passports with Taiwan as the place of birth if a United States citizen born there wanted to have Taiwan on his or her passport; is that correct?

MS. COLEMAN: Object to form.

BY MR. LEWIN: Q Is that correct?

A U.S. citizens may request Taiwan to be put in their passport.

Q Even though this instruction clearly states that the United States does not officially recognize Taiwan as a state?

A This part of the document says states.

Q Let's look at the bottom part which you read. Passports may not -- repeat, not -- be issued showing place of birth as Taiwan, China, Taiwan Republic of China, or Taiwan ROC and then it goes on to say the United States recognizes the government of the People's Republic of China as the sole legal [77] government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China. So that's a reason why Taiwan would not be listed on a passport, isn't that true, separately?

MS. COLEMAN: Object to form.

THE WITNESS: I believe we're reading this differently.

BY MR. LEWIN: Q Explain how you're reading it.

A I believe -- this is how I would understand this to be. This is context for the passport employees to indicate that there is not a dispute over the sovereignty of Taiwan.

Q Just to complete that subject, let me mark Barry Exhibit 14.

(Barry Exhibit No. 14 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q There's Barry Exhibit 14 in front of you. That was a cable that went out; is that correct?

[78] A Yes, it is.

Q That cable, essentially if you'll turn to the page that's been Bates stamped 420, says effective immediately applicants for U.S. passports or consular reports of birth abroad who were born in Taiwan may request that Taiwan be listed as the place of birth on that document; is that correct?

A Yes, it is.

Q The next page, page 412 says in I guess as the maybe second paragraph, please note that although Taiwan may be listed as a place of birth in passports, the United States does not recognize Taiwan as a foreign state. The United States recognizes the government of the People's Republic of China as the sole legal government of China and it acknowledges the Chinese position that there is only one China and Taiwan is part of China. That cable says that; correct?

A Yes, that is the text.

Q Are you familiar with the passport policy that has been applied to Hong Kong since by international agreement it was made part of the [79] Republic of China?

A Yes, I'm aware of that policy.

Q People's Republic of China. It's a fact, is it not, that notwithstanding that change, passports may continue to be issued with the name of Hong Kong.

A That is not correct.

Q What's currently the policy --

A Hong Kong SAR is the correct word.

Q What does SAR stand for?

A I believe it's something along the lines of special autonomous region, something, specially administered region. I am not exactly sure of the acronym. The acronym refers to its legal status within China.

(Barry Exhibit No. 15 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q In front of you is Barry Exhibit 15. Is that the cable that gave the instruction regarding continuing to list persons born in Hong Kong on a [80] passport as Hong Kong SAR -- you corrected me, Hong Kong SAR, not just Hong

Kong -- notwithstanding the fact that there had been an agreement under which Hong Kong was going to be subject to the sovereignty of the People's Republic of China?

MS. COLEMAN: Object to form.

THE WITNESS: It is an instruction that does not indicate to people to continue an old practice, it's an instruction to consular officers to do a new practice which is to refer to Hong Kong in U.S. passports as Hong Kong SAR, given the change of its legal status.

BY MR. LEWIN: Q But designating Hong Kong SAR was not consistent with the international recognition that is provided to Hong Kong as part of the People's Republic of China, is that true?

MS. COLEMAN: Object to form.

THE WITNESS: You're beyond my level of knowledge about China. As the cable states, Hong Kong SAR has a high degree of political and economical autonomy.

[81] BY MR. LEWIN: Q You're right, that cable says that because it has a high degree of political and economical autonomy, posts are instructed to list Hong Kong SAR on United States passports, notwithstanding the agreement that was signed, if you look at the preceding paragraph, notwithstanding the agreement that was agreement that gave sovereignty of Hong Kong to the People's Republic of China.

A I'm unaware of the details of the joint declaration of sovereignty.

MR. LEWIN: I think we're finished, thank you very much.

(Signature having not been waived, the deposition of Catherin Barry, was adjourned at 4:45 p.m.)

7 FAM 1383 PLACE OF BIRTH TRANSCRIPTION

7 FAM 1383.1 Transcription and Entry in Passports

a. As a general rule, enter the country of the applicant's birth in the passport. This applies whether the person was born in or outside the United States. See the following sections for more specific information. b. A birthplace transcription guide covering the United States and other countries and territories is included as 7 FAM 1883 Exhibit 1883.1. *Follow the transcription guide when entering the place of birth in the passport.*

NOTE: *In machine readable passports certain birthplaces may be transcribed in different, although standardized, formats, because the birthplace field is limited to 24 characters.*

7 FAM 1383.2 Persons Born in the United States

a. For persons born in the United States, the unabbreviated name of the State, followed by the initials "U.S.A.," is written in the passport. The entry "DISTRICT OF COLUMBIA, U.S.A." is used instead of "Washington, D.C." The passport application should show the exact locality of birth, that is, the city or county, and State. (See 7 FAM 1883 Exhibit 1883.1 , Part I.)

b. For persons born in the U.S. territories and outlying areas, enter in the passport the name of the territory or possession as the place of birth. The designation "U.S.A." is written only after Puerto Rico, Guam, and the Northern Mariana Islands. (See 7 FAM 1883 Exhibit 1883.1, Part II.).

7 FAM 1383.3 Naturalized Persons Whose Country of Birth Agrees With Former Nationality

When the country of birth shown on the application agrees with the former nationality shown on the naturalization certificate (or country of birth shown on other citizenship documents), and it is an acceptable place of birth listed in the birthplace transcription guide (see 7 FAM 1383 Exhibit 1383.1), then enter in the passport the country of birth as shown on the application. In such situations, the consular officer need not question whether the country of birth listed on the application and citizenship documents has present sovereignty over the actual place of birth.

7 FAM 1383.4 Naturalized Persons Whose Country of Birth Differs from Former Nationality

a. When the country of birth shown on the application differs from the former nationality, the country of birth shown on the application ordinarily may be written in the passport if it is an acceptable place of birth listed in the guide (see 7 FAM 1383 Exhibit 1383.1).

b. However, if there is a question as to what country has present sovereignty over the actual area of birth, the consular officer should verify the country having present sovereignty and change the application, if necessary. A frequent example requiring verification occurs when an applicant was born in a part of a country (for example, Danzig, Germany) which was later legally annexed by another country (Poland), and renamed (Gdansk). The application would show birthplace as Germany; the naturalization certificate would show nationality as Polish.

7 FAM 1383.5 Persons Whose Country Is Incorporated Into Another Country

7 FAM 1383.5-1 Country Not Recognized
Enter in the passport the name of any independent country whose incorporation into another nation is not recognized by the United States (for example, Estonia, Latvia, and Lithuania) as the country of birth, if shown on the application. (See also section 7 FAM 1383.6 .)

7 FAM 1383.5-2 Disputed Territory
Where the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport (for example, Danzig, or Gdansk, East Prussia, or Bessarabia), if shown on the application and if included for use on the birthplace transcription guide.

7 FAM 1383.5-3 U.S.S.R., Russia, Byelorussia, Ukraine
If applicants were born in the Union of Soviet Socialist Republics, Russia, Byelorussia, or the Ukraine, regardless of the date of birth, the birthplace should be written as either U.S.S.R., Russia, Byelorussia, or Ukraine, whichever is stated on the application.

7 FAM 1383.5-4 Palestine
Applicants who were born in the area formerly known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place

of birth. In such instances the general policy of showing the birthplace as the country having present sovereignty must be explained to the applicant. Consular officers may make exceptions to show Palestine as the birthplace in individual cases upon consideration of all the circumstances, provided the applicant was born before 1948. If the applicant was born in 1948 or thereafter, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty. (See section 7 FAM 1383.6.) For information on that part of Palestine now known as the West Bank, see sections 7 FAM 1383.5-5 and 7 FAM 1383.5-6.

7 FAM 1383.5-5 Israel-Occupied Areas

As a result of prior conflicts and the so-called "June 1967 war," the Government of Israel currently occupies and administers *the Golan Heights, the West Bank, and the Gaza Strip. U.S. policy holds that the Golan Heights is Syrian territory, and that the West Bank and Gaza Strip are territories whose final status must be determined by negotiations.* Generally, the policy is to write the name of the country which retains sovereignty as the place of birth. If the applicant objects, enter the area or city name as listed in this section.

Make clear to the applicant, however, that a foreign official who examines the passport and is unfamiliar with *(or objects to)* the area name may question its appearance in the passport *and possibly deny entry to the bearer.*

Area Name	**Country Name**
Golan Heights	SYRIA
West Bank, Jordan	WEST BANK

Gaza Strip	GAZA STRIP (preferred)
Sinai	EGYPT

NOTE: Do not enter ISRAEL in U.S. passports as the place of birth for applicants born in the occupied territories.

NOTE: The GAZA STRIP area was last part of a sovereign nation when part of Palestine. Therefore, PALESTINE is the alternate acceptable entry provided the applicant was born before 1948.

NOTE: Those persons born before May, 1948 in the area known as the West Bank may prefer to have PALESTINE listed as an alternate entry. Those born in 1948 or later may prefer to have their city of birth as an alternate entry. Persons born in the West Bank in 1948 or later may not have Palestine transcribed as an alternate entry.

7 FAM 1383.5-6 Jerusalem

For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5 *).*

7 FAM 1383.5-7 Birth in the Former Canal Zone
For persons born on or after October 1, 1979, enter the place of birth in the passport as PANAMA. For persons born prior to October 1, 1979, show PANAMA as the place of birth; however, if the applicant objects, enter CANAL ZONE as the place of birth. When the applicant objects to the use of either Panama or Canal Zone as the place of birth designation in the passport, enter the city or town of birth (for instance, GATUN, not Canal Zone or Panama).

7 FAM 1383.5-8 Birth at Sea or in the Air
When birth or citizenship documents indicate that birth occurred in the air or at sea, and no country is considered to have sovereignty over the area of birth, enter "At Sea" or "In the Air" in the passport as the place of birth.

7 FAM 1383.6 City of Birth Listing
a. U.S. citizens born abroad are permitted the option of entering the name of the city or town, rather than the country, of their birth when there are objections to the country listing shown on the birthplace guide. The name of the city or town of birth designated will be the name at the date of the applicant's birth, or the current name. Refer requests for verification of the proper city name to be listed to the appropriate geographic branch of CA/OCS/CCS.

b. Advise applicants who prefer the city or town designation of difficulties which they may encounter in traveling to, or obtaining visas for entry into, certain foreign countries. If an applicant must subsequently be issued a replacement passport

listing the country of birth designation, the applicant will incur the expense of the replacement passport. *Consular officers may give the applicant a copy of the Department's M-397 bulletin*, Notice to United States Citizens Born Abroad Regarding Places of Birth To Be Written in Passports, *available from CA/EX/AG (*see 7 FAM 1383 Exhibit 1383.6 *).*

7 FAM 1383 Exhibit 1383.1

(TL:CON-44; 10-15-87)

BIRTHPLACE TRANSCRIPTION GUIDE FOR USE IN PREPARING PASSPORTS

PART I: THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

Part I of the birthplace transcription guide shows the acceptable name and spelling for specific States of the United States of America for use in U.S. passports (see section 7 FAM 1383.2).

Birthplace

ALABAMA, U.S.A.	MONTANA, U.S.A
ALASKA, U.S.A.	NEBRASKA, U.S.A.
ARIZONA, U.S.A.	NEVADA, U.S.A.
ARKANSAS, U.S.A.	NEW HAMPSHIRE, U.S.A.
CALIFORNIA, U.S.A.	NEW JERSEY, U.S.A.
COLORADO, U.S.A.	NEW MEXICO, U.S.A.
CONNECTICUT, U.S.A.	NEW YORK, U.S.A.
DELAWARE, U.S.A.	NORTH CAROLINA, U.S.A.
DISTRICT OF COLUMBIA, U.S.A.	NORTH DAKOTA, U.S.A.
FLORIDA, U.S.A.	OHIO, U.S.A.

GEORGIA, U.S.A.
HAWAII, U.S.A.
IDAHO, U.S.A.
ILLINOIS, U.S.A.
INDIANA, U.S.A.
IOWA, U.S.A.
KANSAS, U.S.A.
KENTUCKY, U.S.A.
LOUISIANA, U.S.A.
MAINE, U.S.A.
MARYLAND, U.S.A.
MASSACHUSETTS, U.S.A.
MICHIGAN, U.S.A.
MINNESOTA, U.S.A.
MISSISSIPPI, U.S.A.
MISSOURI, U.S.A.
OKLAHOMA, U.S.A.
OREGON, U.S.A.
PENNSYLVANIA, U.S.A.
RHODE ISLAND, U.S.A.
SOUTH CAROLINA, U.S.A.
SOUTH DAKOTA, U.S.A.
TENNESSEE, U.S.A.
TEXAS, U.S.A.
UTAH, U.S.A.
VERMONT, U.S.A.
VIRGINIA, U.S.A.
WASHINGTON, U.S.A.
WEST VIRGINIA, U.S.A.
WISCONSIN, U.S.A.
WYOMING, U.S.A.

PART II: OTHER COUNTRIES AND TERRITORIES

Part II of the birthplace transcription guide shows the acceptable name and spelling for specific countries and territories to be used in U.S. passports (see section 7 FAM 1383.1). Names all in upper case in the left column show the correct form to be used. All others show the correct name of the country in the column on the right. All names to be used appear in upper case type.

Numbers in the right -hand column refer to the relevant 7 FAM section on exceptions.

Birthplace Entry/Additional Information	
A	
Abu Dhabi	UNITED ARAB EMIRATES

Abyssinia	ETHIOPIA
Aden	YEMEN-ADEN
Admiralty Islands	PAPUA NEW GUINEA
AFGHANISTAN	
Africa	[Determine specific country.]
Agrihan	NO. MARIANA IS., U.S.A.
Ajman	UNITED ARAB EMIRATES
Alamagan	NO. MARIANA IS., U.S.A.
ALBANIA	
Aleutian Islands	ALASKA, U.S.A.
ALGERIA	
Alsace-Lorraine	FRANCE
AMERICAN SAMOA	[Includes Manua, Tutuila, and Swains Island.Do not confuse with Western Samoa.]
ANDORRA	
Anegada	BRITISH VIRGIN ISLANDS
Anglo-Egyptian Sudan	SUDAN
ANGOLA	[Includes Cabinda.]
ANGUILLA	
Annobon	EQUATORIAL GUINEA
Antigua	ANTIGUA and BARBUDA
ANTIGUA AND BARBUDA	
ARGENTINA	
Armenia	[Determine specific country.]
ARUBA	
Ascension Island	ST. HELENA
Asia	[Determine specific country.]
Asia Minor	[Determine specific country.]
AT SEA	[Use if no country has Sovereignty. See section 7 FAM 1383.5-8 .]

AUSTRALIA	[Includes New South Wales and Tasmania.]
Austral Islands	FRENCH POLYNESIA
AUSTRIA	
Austria-Hungary	[Determine specific country.]
Azores	PORTUGAL
B	
Bahamas	THE BAHAMAS
BAHRAIN	[Formerly listed as Bahrein Islands.]
BAKER ISLAND	
Balearic Islands	SPAIN
Bali	INDONESIA
Baluchistan	PAKISTAN
BANGLADESH	[Formerly East Pakistan or East Bengal.]
BARBADOS	
Barbuda	ANTIGUA AND BARBUDA
Basutoland	BESOTHO
Bechuanaland	BOTSWANA
Belgian Congo	ZAIRE
BELGIUM	
BELIZE	[Formerly British Honduras.]
BENIN	[Formerly known as Dahomey.]
Berlin, East or West	GERMANY
BERMUDA	
BESSARABIA	[See section 7 FAM 1383.5-2 .]
BHUTAN	
Bikini	MARSHALL ISLANDS

Bioko	EQUATORIAL GUINEA [Formerly known as Fernando Po.]
BOLIVIA	
Bonaire	NETHERLANDS
ANTILLES	
Bonin Islands	JAPAN [Includes Nampo-Shoto, Bonin Islands, Volcano Islands, Rosario Island (Nishino-Shima), Marcus Island (Monami-Torj-Shima), and Parece (Okino-Tori-Shima).]
Borneo	BRUNEI, MALAYSIA or INDONESIA, as appropriate.
BOTSWANA	[Formerly Bechuanaland.]
Bougainville	PAPUA NEW GUINEA
BRAZIL	
British Cameroons	NIGERIA [Do not confuse with former French Cameroons. See Cameroons.]
British Guiana	GUYANA
British Honduras	BELIZE [Do not confuse with Honduras.]
British Isles	IRELAND or UNITED KINGDOM, as appropriate
British North Borneo	MALAYSIA [Includes Labuan.]
British Samoa	WESTERN SAMOA
British Solomon Islands	SOLOMON ISLANDS
British Somaliland	SOMALIA
British Togoland	GHANA [Do not confuse with Togo, formerlyFrench

	Togoland.]
BRITISH VIRGIN ISLANDS	[Includes Tortola, Virgin Gorda, Anegada, Jost Van Dykes. Do not confuse with U.S. Virgin Islands.]
British West Indies	[Determine specific island group, such as THE BAHAMAS or BRITISH VIRGIN ISLANDS.]
BRUNEI	[North coast of island of Borneo.]
Buka	PAPUA NEW GUINEA
BULGARIA	
BURMA	
BURKINA FASO	[Formerly known as Upper Volta.]
BURUNDI	[Formerly part of Ruanda-Urundi.]
BYELORUSSIA	[See section 7 FAM 1383.5-3 .]
C	
Cabinda	ANGOLA
Caicos Islands	TURKS AND CAICOS ISLANDS
CAMBODIA	[Formerly Kampuchea.]
CAMEROON	[Formerly French Cameroons and the Southern Division of the Cameroons. See Cameroons.]
Cameroons, Northern Division	NIGERIA [Formerly British.]
Cameroons, Southern Division	CAMEROON [Formerly French.]

Cameroun	CAMEROON
CANADA	[Includes Labrador and Newfoundland.]
Canal Zone	PANAMA [See section 7 FAM 1383.5-7 .]
Canary Islands	SPAIN
Canton and Enderbury Islands	KIRIBATI
Cape of Good Hope	SOUTH AFRICA
CAPE VERDE	
Caroline Island	KIRIBATI [Do not confuse with Caroline Islands.]
Caroline Islands, Eastern	MICRONESIA [Includes 4 islands--Yap, Truk, Ponape, and Kosrae--now collectively known as the Federated States of Micronesia.]
Caroline Islands, Western	TRUST TERR. OF THE PACIFIC [Now includes only Palau Island.]
CAYMAN ISLANDS	
Celebes	INDONESIA
Central African Empire	CENTRAL AFRICAN REPUBLIC
CENTRAL AFRICAN REPUBLIC	[Includes part of former French Equatorial Africa.]
Ceuta	SPAIN
Ceylon	SRI LANKA
CHAD	
Channel Islands	UNITED KINGDOM
CHILE	[Includes Easter Island.]
CHINA	[Also known as People's Republic of China. Includes Hainan Island,

	Inner Mongolia, Manchuria, Sinkiang, and Tibet.]
China, Communist	CHINA
China, People's Republic of	CHINA
China, Republic of	CHINA, [Formerly known as Formosa. Also known as Taiwan. Includes Pescadore Islands.]
Choiseul	SOLOMON ISLANDS
Chosen	KOREA
CHRISTMAS ISLAND (Indian Ocean)	[Do not confuse with Christmas Island in the Pacific Ocean.]
Christmas Island (Pacific Ocean)	KIRIBATI [Do not confuse with Christmas Island in the Indian Ocean.]
COCOS ISLANDS	
COLOMBIA	
Commonwealth of the Northern Mariana Islands	NO. MARIANA IS., U.S.A.
COMOROS	
CONGO	[Also known as People's Republic of the Congo (Congo-Brazzaville). Formerly French Congo. Do not confuse with former Democratic Republic of the Congo (Congo-Kinshasa), now known as Zaire. See Zaire.]
Congo-Brazzaville	CONGO
Congo-Kinshasa	ZAIRE
Congo, Democratic Republic of the	ZAIRE

Congo, People's Republic of the	CONGO
COOK ISLANDS	
Corisco	EQUATORIAL GUINEA [Do not confuse with Corsica.]
Corsica	FRANCE
COSTA RICA	
COTE D'IVOIRE	Formerly Known as Ivory Coast.
Crete	GREECE
Croatia	YUGOSLAVIA
CUBA	[Includes Isle of Pines (Isla de la Juventud).]
Curacao	NETHERLANDS ANTILLES
CYPRUS	
CZECHOSLOVAKIA	
D	
Dahomey	BENIN
Damao	INDIA
DANZIG	[May also be written as Gdansk. See section 7 FAM 1383.5-2 .]
DENMARK	
Desirade	GUADELOUPE
Diu	INDIA
DJIBOUTI	[Formerly French territory of Afars and Issas. Includes former French Somaliland.]
Dodecanese Islands	GREECE
DOMINICA	[Do not confuse with Dominican Republic.]

DOMINICAN REPUBLIC	[Do not confuse with Dominica.]
Dubai	UNITED ARAB EMIRATES
Dutch Guiana	SURNAME
E	
East Bengal	BANGLADESH [Formerly part of Pakistan.]
East Germany (GDR)	GERMANY
East Pakistan	BANGLADESH [Formerly part of Pakistan.]
EAST PRUSSIA	[See section 7 FAM 1383.5-2 .]
Easter Island	CHILE
ECUADOR	[Includes Galapagos Islands.]
EGYPT	[Formerly United Arab Republic.]
Eire	IRELAND
Elba	ITALY
Ellice Islands	TUVALU
Elobey Islands	EQUATORIAL GUINEA
EL SALVADOR	
Enderbury Island	KIRIBATI
England	UNITED KINGDOM
Eniwetok Atoll	MARSHALL ISLANDS
EQUATORIAL GUINEA	[Formerly Spanish Equatorial Guinea. Includes Rio Muni, and the islands of Bioko (Fernando Po), Annobon, Corisco, and Elobey. Do not confuse with Guinea or Guinea-Bissau.]
Eritrea	ETHIOPIA

ESTONIA	[See section 7 FAM 1383.5-1 .]
ETHIOPIA	[Formerly Abyssinia. Includes former Eritrea.]
EUROPE	[Determine specific country.]
F	
FALKLAND ISLANDS	[Also known as Islas Malvinas.]
FAROE ISLANDS	[Also known as Faero Islands.]
Federal Republic of Germany (FRG)	GERMANY
Federated States of Micronesia	MICRONESIA
Federation of Malaya	MALAYSIA
Fernando Po	EQUATORIAL GUINEA
FIJI	[Formerly listed as Fiji Islands.]
FINLAND	
Formosa	CHINA
FRANCE	[Includes Alsace-Lorraine and Corsica.]
Free City of Danzig	DANZIG OR GDANSIK [See section FAM07-1383.5-2.]
Free Territory of Trieste	ITALY or YUGOSLAVIA, as appropriate.
French Cameroons	CAMEROON [Do not confuse with former British Cameroons. See Cameroon.]
French Congo	CONGO
French Equatorial Africa	CHAD, GABON, CONGO, or CENTRAL AFRICAN

	REPUBLIC, as appropriate.
FRENCH GUIANA	[South America. Do not confuse with French Guinea (Africa), now known as Guinea.]
French Guinea	GUINEA [Do not confuse with French Guiana.]
French India	INDIA
French Indochina	CAMBODIA, LAOS, or VIETNAM, as appropriate.
French Morocco	MOROCCO
FRENCH POLYNESIA	[Includes Tahiti, Moorea, Austral Islands, Gambier Islands, Marquesas Islands, and Society Islands.]
French Somaliland	DJIBOUTI
French Sudan	MALI
French Territory of Afars and Issas	DJIBOUTI
French Togoland	TOGO. [Do not confuse with British Togoland, now part of Ghana.]
French West Africa	BENIN, GUINEA, IVORY COAST, MALI, MAURITANIA, NIGER, SENEGAL, or BURKINA FASO, as appropriate.
French West Indies	GUADELOUPE or MARTINIQUE, as appropriate.
Friendly Islands	TONGA

Fujairah	UNITED ARAB EMIRATES
G	
GABON	
Galapagos Islands	ECUADOR
Gambia	THE GAMBIA
Gambier Islands	FRENCH POLYNESIA
GAZA STRIP	[See section FAM07-1383.5-5]
GDANSK	[Polish form of Danzig. See section FAM07-1383.5-2.]
German Democratic Republic (GDR)	GERMANY
GERMANY	[Includes Helgoland and the Saar.]
GHANA	[Formerly Gold Coast. Includes former British Togoland.]
GIBRALTAR	
Gilbert and Ellice Islands	KIRIBATI or TUVALU, as appropriate.
Gilbert Islands	KIRIBATI
Goa	INDIA
Golan Heights	SYRIA (See section FAM07-1383.5-5.]
Gold Coast	GHANA
Gozo	MALTA
Great Britain	UNITED KINGDOM
GREECE	[Includes Crete, Dodecanese Islands and Rhodes.]
GREENLAND	
GRENADA	
Guadalcanal	SOLOMON ISLANDS

GUADELOUPE	[Includes St. Barthelemy, the northern part of St. Martin, Les Saintes, Desirade, and Marie-Galante.]
GUAM	
GUATEMALA	
GUINEA	[Formerly French Guinea. Do not confuse with Equatorial Guinea or Guinea-Bissau.]
GUINEA-BISSAU	[Formerly Portuguese Guinea. Do not confuse with Guinea of Equatorial Guinea.]
GUYANA	[Formerly British Guiana.]
H	
Hainan Island	CHINA
HAITI	
Helgoland	GERMANY
Holland	NETHERLANDS
HONDURAS	[Do not confuse with British Honduras, now known as Belize.]
HONG KONG	
Horne Island	WALLIS AND FUTUNA
HOWLAND ISLAND	
HUNGARY	
I	
ICELAND	
Ifni	MOROCCO
INDIA	[Includes Karikal, Mahe, Pondichery and Yanaon, and Punjab (East Punjab

	and Sikkim; Damao, Diu, and Goa).]
Indochina	CAMBODIA, LAOS, or VIETNAM, as appropriate
INDONESIA	[Includes Bali, the Celebes, Java, Lombok, Madura, Molucca Islands, Sumatra, Timor, including former Portuguese Timor), and the southern part of the island of Borneo. Includes the former Netherlands East Indies and the former Netherlands New Guinea.]
Inner Mongolia	CHINA
International Zone of Tangier	MOROCCO
IN THE AIR	[Use if no country has sovereignty. See section 7 FAM 1383.5-8 .]
IRAN	
IRAQ	
IRELAND	[Do not confuse with Northern Ireland, which is part of the United Kingdom.]
Irish Free State	IRELAND
Isle of Man	UNITED KINGDOM
Isle of Pines	CUBA [Also known as Isla de la Juventud.]
ISRAEL	[Does not include Jerusalem or areas under military occupation. See section 7 FAM 1383.5-5 .]

Italian Somaliland	SOMALIA
ITALY	[Includes Sardinia, Sicily, and Elba.]
Ivory Coast	COTE D'IVOIRE
J	
JAMAICA	
Jammu	INDIA or PAKISTAN, as appropriate
JAPAN	Includes Ryukyu Islands, Okinawa, and Bonin Islands.
Java	INDONESIA
JERUSALEM	[Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6.]
JOHNSTON ATOLL	
Johore	MALAYSIA
JORDAN	[Does not include Jerusalem. See sections 7 FAM 1383.5-4 , 7 FAM 1383.5-5 .]
Jost Van Dykes	BRITISH VIRGIN ISLANDS
Jugoslavia	YUGOSLOVIA
K	
Kamaran Island	YEMEN-ADEN
Kampuchea	CAMBODIA [Also known as Khmer Republic.]
Karikal	INDIA
Kashmir	INDIA or PAKISTAN, as appropriate.
Kedah	MALAYSIA
Kelantan	MALAYSIA
KENYA	

Khmer Republic	CAMBODIA [Formerly known as Kampuchea.]
KIRIBATI	[Includes the Gilber Islands (formerly part of the Gilber and Ellice Islands); Banala (Ocean Island); Carolina, Christmas, Fanning, Flint, Malden, Starbuck, Vostok, and Washington Islands in the Line Islands; and the Phoenix Islands (including Canton and Enderbury Islands).]
KOREA	
Kowloon	HONG KONG
KUWAIT	
Kwajalein	MARSHALL ISLANDS
L	
Labrador	CANADA
Labuan	MALAYSIA
LAOS	
LATVIA	[See section 7 FAM 1383.5-1 .]
LEBANON	
LESOTHO	[Formerly Basutoland.]
Les Saintes	GUADELOUPE
LIBERIA	
LIBYA	[Includes Tripolitania]
LIECHTENSTEIN	
LITHUANIA	[See section 7 FAM 1383.5-1 .]
Lombok	INDONESIA
Loyalty Islands	NEW CALEDONIA
LUXEMBOURG	

M

MACAU	[Also known as Macao.]
MADAGASCAR	[Also known as Malagasy Republic.]
Madeira Islands	PORTUGAL
Madura	INDONESIA
Mahe	INDIA
Malacca	MALAYSIA [Do not confuse with Molucca Islands, which are part of Indonesia.]
Malagasy Republic	MADAGASCAR
Malaita	SOLOMON ISLANDS
MALAWI	[Formerly known as Nyasaland.]
Malaya	MALAYSIA
MALAYSIA	[Formerly Federation of Malaya, which included British North Borneo and Sarawak. Includes Johore, Kedah, Kelantan, Labuan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor, and Trengganu.]
Malden Island	KIRIBATI
MALDIVES	[Formerly written as Maldive Islands.]
MALI	[Formerly known as Soudanese Republic, French Sudan.]
MALTA	[Includes Gozo.]
Manchuria	CHINA
Manua	AMERICAN SAMOA
Margarita Island	VENEZUELA

Mariana Islands	NO. MARIANA IS., U.S.A. [Includes Saipan and Tinian.]
Marie-Galante	GUADELOUPE
Marquesas Islands	VENEZUELA
Marshall Islands	MARSHALL ISLANDS
Marshall Islands, Republic of	MARSHALL ISLANDS [Includes Bikini, Eniwetok, and Kwajalein Atolls.]
MARTINIQUE	
MAURITANIA	[Formerly part of French West Africa. Do not confuse with Mauritius.]
MAURITIUS	[Do not confuse with Mauritania.]
Melila	SPAIN
Mesopotamia	IRAQ
MEXICO	
MICRONESIA	
Micronesia, Federated States of	MICRONESIA [Includes island states of Yap, Truk, Ponape and Kosrae.]
Middle Congo	CONGO [Also known as People's Republic of the Congo.]
MIDWAY ISLANDS	
Miquelon	ST. PIERRE AND MIQUELON
Mollucca Islands	INDONESIA [Do not confuse with Malacca.]
MONACO	
MONGOLIA	

Mongolia, Inner	CHINA
Mongolia, Outer	MONGOLIA
Montenegro	YUGOSLAVIA
MONTSERRAT	
Moorea	FRENCH POLYNESIA
MOROCCO	[Includes Ifni, French Morocco, the former International Zone of Tangier, and former Spanish Morocco.]
MOZAMBIQUE	[Formerly part of Portuguese (African) Overseas Provinces.]
Muscat and Oman	OMAN
N	
NAMIBIA	[Formerly known as South-West Africa.]
Natal	SOUTH AFRICA
Nationalist China	CHINA
NAURU	
Negri Sembilan	MALAYSIA
NEPAL	
NETHERLANDS	
NETHERLANDS ANTILLES	[Includes Aruba, Bonaire, Curacao, Saba, St. Eustatius, and the southern half of St.Martin.]
Netherlands East Indies	INDONESIA
Netherlands New Guinea	INDONESIA
Netherlands West Indies	NETHERLANDS ANTILLES
Nevis	ST. CHRISTOPHER AND NEVIS
New Britain	PAPUA NEW GUINEA

NEW CALEDONIA	[Includes Loyalty Islands.]
Newfoundland	CANADA
New Guinea	PAPUA NEW GUINEA or INDONESIA, as appropriate.
New Hebrides	VANUATU
New Ireland	PAPUA NEW GUINEA
New South Wales	AUSTRALIA
NEW ZEALAND	[Includes Chatham, North Island, South Island, and Stewart.]
NICARAGUA	
NIGER	[Formerly part of French West Africa.]
NIGERIA	[Formerly British Cameroons. See Cameroons.]
NIUE	[South Pacific; former British Commonwealth colony, now in free association with New Zealand.]
NORFOLK ISLAND	
North America	CANADA, MEXICO or individual state, U.S.A., as appropriate
Northeast New Guinea	PAPUA NEW GUINEA
Northern Ireland	UNITED KINGDOM [Includes Antrim, Armagh, Down, Fermanagh, Londonderry, Tryone and City of Belfast. Do not confuse with Ireland.]
Northern Islands	NO. MARIANA IS., U.S.A.
Northern Mariana Islands,	

Commonwealth of the	NO. MARIANA IS., U.S.A. [Includes Saipan and Tinian.]
Northern Marianas	NO. MARIANA IS., U.S.A.
Northern Rhodesia	ZAMBIA
NORWAY	
Nyasaland	MALAWI
O	
Okinawa	JAPAN
OMAN	[Formerly Muscat and Oman.]
Orange Free State	SOUTH AFRICA
Orkney Islands	UNITED KINGDOM
Outer Mongolia	MONGOLIA
P	
Pacific Islands, Trust Territory of the	TRUST TERR. OF THE PACIFIC
Pahang	MALAYSIA
PAKISTAN	[Includes Baluchistan, Punjab (West) and Sind.]
Palau	TRUST TERR. OF THE PACIFIC
Palau, Republic of	TRUST TERR. OF THE PACIFIC
Palestine	ISRAEL, JERUSALEM, JORDAN, WEST BANK, GAZA STRIP, PALESTINE, area/city of birth, as appropriate. See sections FAM07-1383.5-4 through 7 FAM 1382..5-6.]
Palau, Republic of	TRUST TERR. OF THE PACIFIC
PALMYRA ATOLL	

PANAMA	[Includes Colon and Panama City, as well as the former Canal Zone. See section 7 FAM 1383.5-7 .]
Papua	PAPUA NEW GUINEA
Papua and New Guinea	PAPUA NEW GUINEA
Papua and Territory of New Guinea	PAPUA NEW GUINEA
PAPUA NEW GUINEA	[Formerly Papua and New Guinea, and Papua and Territory of New Guinea. Includes the Admiralty Islands, Bougainville, Buka, New Britain, New Ireland, and Northeast New Guinea.]
PARAGUAY	
Pemba Island	TANZANIA
Penang	MALAYSIA
People's Republic of the Congo	CONGO
Perak	MALAYSIA
Perim Island	YEMEN-ADEN
Perlis	MALAYSIA
Persia	IRAN
PERU	
Pescadore Islands	CHINA
PHILIPPINES	[Formerly listed as Philippine Islands.]
PITCAIRN ISLAND	
Pohnpei	MICRONESIA
POLAND	
Ponape	MICRONESIA. [Also known as Pohnpei.]

Pondichery	INDIA
PORTUGAL	[Includes Azores, and Madeira Islands.]
Portuguese (African) Overseas Provinces	ANGOLA, MOZAMBIQUE, GUINEA-BISSAU, CAPE VERDE, or SAO TOME AND PRINCIPE, as appropriate.
Portuguese Guinea	GUINEA-BISSAU
Portuguese India	INDIA [Includes Damao, Diu, and Goa.]
Portuguese Timor	INDONESIA
Principe Island	SAO TOME AND PRINCIPE
PUERTO RICO	
Punjab (West)	PAKISTAN
Punjab (East)	INDIA
Q	
QATAR	
R	
Rapa Nui	CHILE
Ras al Khaimah	UNITED ARAB EMIRATES
Redonda	ANTIGUA AND BARBUDA
Republic of South Africa	SOUTH AFRICA [Includes the provinces of Cape of Good Hope, Natal, Orange Free State, Transvaal, and Walvis Bay.]
REUNION	
Rhodes	GREECE
Rhodesia	ZIMBABWE

Rhodesia, Northern	ZAMBIA
Rhodesia, Southern	ZIMBABWE
Rio de Oro	WESTERN SAHARA
Rio Muni	EQUATORIAL GUINEA
ROMANIA	[Formerly known as Rumania.]
Rota	NO. MARIANA IS., U.S.A. [Do not confuse with Rota Air Force Base, Spain.]
Ruanda-Urundi	BURUNDI or RWANDA, as appropriate
Rumania	ROMANIA
RUSSIA	[See section 7 FAM 1383.5-3 .]
RWANDA	
Ryukyu Islands	JAPAN
S	
Saar, The	GERMANY
Saba	NETHERLANDS ANTILLES [Do not confuse with Sabah, which is part of Malaysia.]
Sabah	MALAYSIA [Formerly British Borneo. Do not confuse with Saba.]
Saipan	NO. MARIANA IS., U.S.A.
St. Barthelemy	GUADELOUPE
St. Christopher (St. Kitts)	ST. CHRISTOPHER AND NEVIS
ST. CHRISTOPHER AND NEVIS	
St. Croix	VIRGIN ISLANDS OF THE U.S.
St. Eustatius	NETHERLANDS ANTILLES

ST. HELENA	[Includes Ascension and Tristan da Cuzba Islands.]
St. John	VIRGIN ISLANDS OF THE U.S.
St. Kitts (St. Christopher)	ST. CHRISTOPHER AND NEVIS
ST. LUCIA	
St. Martin (French part)	GUADELOUPE
St. Martin (Netherlands part)	NETHERLANDS ANTILLE
St. Martin (no record of which part)	ST. MARTIN
ST. PIERRE AND MIQUELON	
St. Thomas	VIRGIN ISLANDS OF THE U.S.
St. Vincent	ST. VINCENT AND THE GRENADINES
ST. VINCENT AND THE GRENADINES	[Formerly St. Vincent. Includes Northern Grenadine Islands.]
Saipan	NO. MARIANA IS., U.S.A.
Samoa	AMERICAN SAMOA or WESTERN SAMOA, as appropriate.
San Cristobal	SOLOMON ISLANDS
SAN MARINO	
Santa Isabel	SOLOM ISLANDS
SAO TOME AND PRINCIPE	... [Formerly part of Portuguese (African) Overseas Provinces.]
Sarawak	MALAYSIA
Sardinia	ITALY
SAUDI ARABIA	
Scotland	UNITED KINGDOM
Selangor	MALAYSIA

SENEGAL	[Formerly part of French West Africa.]
Serbia	YUGOSLAVIA
SEYCHELLES	
Sharjah	UNITED ARAB EMIRATES
Shetland Islands	UNITED KINGDOM
Siam	THAILAND
Siberia	U.S.S.R. [See U.S.S.R.]
Sicily	ITALY
SIERRA LEONE	
Sikkim	INDIA
Sinai Peninsula	EGYPT [See section 7 FAM 1383.5-5 .]
Sind	PAKISTAN
SINGAPORE	
Sinkiang (Xinjiang)	CHINA
Sint Maarten	NETHERLANDS ANTILLES
Society Islands	FRENCH POLYNESIA [Includes Tahiti and Moorea.]
Socotra Islands	YEMEN-ADEN
SOLOMON ISLANDS	[Formerly known as British Solomon Islands. Includes southern Solomon Islands, primarily Guadalcanal, Malaita, San Cristobal, Santa Isabel, and Choiseul. Do not confuse with the portion of the Solomon Islands (primarily Bougainville and Buka) which is now

	part of Papua New Guinea.]
Somali Democratic Republic	
SOMALIA	SOMALIA Formerly Italian Somaliland and British Somaliland. Formerly listed as Somali Democratic Republic.]
Soudan	MALI
Soudanese Republic	MALI
SOUTH AFRICA	Formerly listed as Republic of South Africa. Do not confuse with South-West Africa, now known as Namibia.
South America	[Determine specific country.]
South Arabia	YEMEN-ADEN [Formerly Aden or Southern Yemen.]
Southern Borneo	INDONESIA
Southern Rhodesia	ZIMBABWE
South Yemen	YEMEN-ADEN
South-West Africa	NAMIBIA [Do not confuse with South Africa.]
Soviet Union	U.S.S.R. [See section 7 FAM 1383.5-3 .]
SPAIN	[Includes the Balearic and Canary Islands, Ceuta and Melilla.]
Spanish Equatorial Guinea	EQUATORIAL GUINEA
Spanish Morocco	MOROCCO
Spanish Sahara	WESTERN SAHARA

SRI LANKA	[Formerly known as Ceylon and Sri Lanka-Ceylon.]
Starbuck Island	KIRIBATI
Straits Settlements	MALAYSIA
SUDAN	[Formerly Anglo-Egyptian Sudan. Do not confuse with Soudan or Soudanese Republic, which is now part of Mali.]
Sumatra	INDONESIA
SURINAME	[Formerly Dutch Guiana. Formerly listed as Surinam.]
Swains Island	AMERICAN SAMOA
SWAZILAND	
SWEDEN	
SWITZERLAND	
SYRIA	
T	
Tahiti	FRENCH POLYNESIA
Taiwan	CHINA [Also known as Republic of China or Nationalist China. Formerly Formosa. Includes Pescadore Islands.]
Tanganyika	TANZANIA
Tangier	MOROCCO
TANZANIA	[Formerly known as Tanganyika and Zanzibar. Includes Pemba Island. Do not confuse with Tasmania, which is part of Australia.]

Tasmania	AUSTRALIA [Do not confuse with Taszania.]
Territory of New Guinea	PAPUA NEW GUINEA
THAILAND	[Formerly known as Siam.]
THE BAHAMAS	[Formerly known as Bahamas.]
THE GAMBIA	[Formerly known as Gambia.]
The West Indies	ANTIGUA AND BARBUDA, MONTSERRAT, and so forth, as appropriate.
Tibet	CHINA
Timor	INDONESIA
Tinian	NO. MARIANA IS., U.S.A.
Tobago	TRINIDAD AND TOBAGO
TOGO	[Formerly French Togoland. Do not confuse with former British Togoland, now part of Ghana.]
Togoland	[Enter TOGO or GHANA, as appropriate.]
TOKELAU	[Includes Atafu, Fafaofu, and Nakunono Atolls.]
TONGA	[Includes Friendly Islands. Formerly listed as Tonga Islands.]
Tortola	BRITISH VIRGIN ISLANDS
Transjordan	JORDAN
Transvaal	SOUTH AFRICA
Trengganu	MALAYSIA

Trieste	ITALY or YUGOSLAVIA, as appropriate.
Trinidad	TRINIDAD AND TOBAGO
TRINIDAD AND TOBAGO	
Tripolitania	LIBYA
Tristan de Cunha Islands	ST. HELENA
Trucial States	UNITED ARAB EMIRATES
Truk Islands	MICRONESIA [Part of Caroline Islands. Do not confuse with Turks and Caicos Islands.]
Trust Territory of the Pacific Islands	TRUST TERR. OF THE PACIFIC. [Now includes only the Republic of Palau. See also Micronesia and Marshall Islands or Republic of the Marshall Islands, which have become self governing sovereign states in "Free Association" with the United States.]
TUNISIA	
TURKEY	
TURKS and CAICOS ISLANDS	[Do not confuse with Truk Islands, which are part of Caroline Islands, Micronesia.]
Tutuila	AMERICAN SAMOA
TUVALU	[Includes the Ellice Islands. Formerly part

Ubangi-Shari	CENTRAL AFRICAN REPUBLIC
UGANDA	
UKRAINE	[See section 7 FAM 1383.5-3 .]
Umm al Qaiwain	UNITED ARAB EMIRATES
Union of South Africa	SOUTH AFRICA
UNITED ARAB EMIRATES	[Formerly known as Trucial States. Includes Abu Dhabi, Dubai, Sharjah, Ajman, Umm al Qaiwain, Ras al Khaimah, and Fujairah.]
United Arab Republic	EGYPT
UNITED KINGDOM	[Includes England, Northern Ireland, Scotland, Wales, Channel Islands, Orkney Islands, Shetland Islands, and Isle of Man.]
Upper Volta	BURKINA [Formerly a part of French West Africa.]
URUGUAY	
U.S.S.R.	[Enter for Union of Soviet Socialist Republics. Except for U.S.A., this is the only abbreviation solely using initials permissible as a placename in the U.S. passport. See section 7 FAM 1383.5-3 .]

VANUATU	
VENEZUELA	[Includes Margarita Island.]
VIETNAM	[Formerly listed as Viet-Nam.]
Virgin Gorda	BRITISH VIRGIN ISLANDS
Virgin Islands	BRITISH VIRGIN ISLANDS or VIRGIN ISLANDS OF THE U.S., as appropriate.
VIRGIN ISLANDS OF THE U.S.	[Includes St. Croix, St. John, and St. Thomas. Do not confuse with British Virgin Islands.]
Volta	BURKINA FASO [Formerly known as Upper Volta.]
W	
WAKE ISLAND	
Wales	UNITED KINGDOM [Do not confuse with New South Wales in Australia.]
WALLIS AND FUTUNA ISLANDS	[Includes Horne Island.]
Walvis Bay	SOUTH AFRICA
WEST BANK	[See section 7 FAM 1383.5-5 .]
West Germany (FRG)	GERMANY
Western Caroline Islands	TRUST TERR. OF THE PACIFIC [Also known as Republic of Palau.]
WESTERN SAHARA	
WESTERN SAMOA	[Formerly British Samoa. Do not confuse with American Samoa.]
West Indies Associated	

States	DOMINICA, ST. CHRISTOPHER AND NEVIS, ST. LUCIA or ST. VINCENT AND THE GRENADINES, as appropriate.
X	
Xinjiang	CHINA
Y	
Yanaon	INDIA
Yap Island	MICRONESIA
Yemen	YEMEN-ADEN or YEMEN-SANAA, as appropriate
YEMEN-ADEN	[Also known as People's Democratic Republic of Yemen. Includes former Aden and former South Arabia and the islands of Kamaran, Perim, Socotra. Do not confuse with Yemen-Sanaa.
Yemen, Arab Republic	YEMEN-SANAA
Yemen, People's Democratic Republic of	YEMEN-ADEN
YEMEN-SANAA	[Also known as Yemen Arab Republic. Formerly listed as Yemen. Do not confuse with Yemen-Aden.
YUGOSLAVIA	
Z	
ZAIRE	[Formerly known as Democratic Republic of the Congo (Congo-Kinshasa) and Belgian Congo. Do not

	confuse with Congo. See Congo.]
ZAMBIA	[Formerly known as Northern Rhodesia.]
Zanzibar	TANZANIA [Includes Pemba.]
ZIMBABWE	[Formerly known as Southern Rhodesia.]

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UNCLAS STATE 299832

INFORM CONSULS

E.O. 12356: N/A
TAGS: CPAS, CMGT
SUBJECT: ADDITION OF TAIWAN AS A PLACE OF BIRTH IN CONSULAR REPORTS OF BIRTH ABROAD AND PASSPORTS

REF: STATE 294076

1. THIS CABLE HAS BEEN CLEARED BY EAP/RSP/TC, EUR/ISCA, EUR/NCE, EUR/SCE, AND FMP/MP (SEP).

2. SUMMARY

SECTION 132 OF THE FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 1994 AND 1995 (PUBLIC LAW 103-236), WHICH PERMITTED THE LISTING OF TAIWAN AS A PLACE OF BIRTH IN REGISTRATIONS OF BIRTH ABD CERTIFICATIONS OF NATIONALITY, HAS BEEN AMENDED BY THE STATE DEPARTMENT AUTHORIZATION TECHNICAL CORRECTIONS ACT OF 1994 (PUBLIC LAW 103-415) TO PERMIT THE LISTING OF TAIWAN AS THE PLACE OF BIRTH IN U.S. PASSPORTS AS WELL.

- - - -

3. TEXT OF THE AMENDED ACT:

"SECTION 132. RECORD OF PLACE OF BIRTH FOR TAIWANESE-AMERICANS.

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FOR PURPOSES OF THE REGISTRATION OF BIRTH OR CERTIFICATION OF NATIONALITY OR ISSUANCE OF A PASSPORT OF A UNITED STATES CITIZEN BORN IN TAIWAN, THE SECRETARY OF STATE SHALL PERMIT THE PLACE OF BIRTH TO BE RECORDED AS TAIWAN."

4. EFFECTIVE DATE OF CHANGE:

EFFECTIVE IMMEDIATELY APPLICANTS FOR U.S. PASSPORTS OR CONSULAR REPORTS OF BIRTH ABROAD (CRBA) WHO WERE BORN IN TAIWAN MAY REQUEST THAT TAIWAN BE LISTED AS THE PLACE OF BIRTH IN THAT DOCUMENT. (PASSPORTS WILL LIST "TAIWAN, AS THE PLACE OF BIRTH, AND CRBA WILL SHOW "(CITY OF BIRTH), TAIWAN" AS THE PLACE OF BIRTH.)

5. MACHINE READABLE PASSPORT (MRP) INSTRUCTIONS:

MRP ISSUING POSTS SHOULD BE ABLE TO COMPLY WITH THESE INSTRUCTIONS BY ENTERING THE FOUR DIGIT CODE "TWAN" IN THE COUNTRY PLACE OF BIRTH SECTION OF THE PASSPORT ENTRY SECTION OF THE CITIZEN SERVICES SYSTEM. MRP AND CSS

POSTS WILL SOON RECEIVE SOFTWARE CHANGING THE CODE TO THE THREE DIGIT "TWN" IN CONFORMANCE WITH THE DOMESTIC PASSPORT PROCESSING SYSTEM. POSTS SHOULD NOTIFY CA/EX/CSD/SUPPORT DESK OF ANY PROBLEMS ENCOUNTERED IN MAKING THIS CHANGE. THAT OFFICE MAY BE CONTACTED ON E-MAIL AT CA (FIRST NAME) SUPPORTDESK (SURNAME) OR BY

PAGE 04 STATE 299832 050392Z
TELEPHONE AT (202) 663-1177.

6. 7 FAM AMENDMENTS:

A. 7 FAM 1383.5 (TL:CON-44, 10-15-87 PAGE 3 OF 6) IS AMENDED TO ADD SECTION 1383.5-9 AS FOLLOWS:

"1383.5-9 BIRTH IN TAIWAN
WHEN THE APPLICANT WRITES TAIWAN AS THE PLACE OF BIRTH AND CITIZENSHIP OR OTHER DOCUMENTATION CONFIRMS THAT THE APPLICANT'S CITY OF BIRTH IS ON ONE OF THE FOLLOWING ISLANDS: TAIWAN (FORMERLY CALLED FORMOSA), PENGHU (FOMERLY CALLED PESCADORE ISLANDS), QUEMOY, OR MATSU, "TAIWAN" MAY BE LISTED AS THE PLACE OF BIRTH IN A PASSPORT. AN APPLICANT WHO WRITES "TAIWAN, CHINA" AS A PLACE OF BIRTH SHOULD BE ASKED WHICH OF THE TWO HE/SHE WOULD PREFER LISTED IN THE PASSPORT. "TAIWAN, CHINA" "TAIWAN,

REPUBLIC OF CHINA" OR "TAIWAN, ROC"ARE NOT/NOT TO BE WRITTEN IN PASSPORTS.

PLEASE NOTE THAT ALTHOUGH TAIWAN MAY BE LISTED AS A PLACE OF BIRTH IN PASSPORTS, THE UNITED STATES DOES NOT RECOGNIZE TAIWAN AS A FOREIGN STATE. THE U.S. RECOGNIZES THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AS THE SOLE LEGAL GOVERNMENT OF CHINA, AND IT ACKNOWLEDGES THE CHINESE POSITION THAT THERE IS ONLY ONE CHINA AND TAIWAN IS PART OF CHINA."

PAGE 05 STATE 299832 050392Z
B. 7 FAM EXHIBIT 1383.1 (PAGE 14 0F 16 TL: CON-44 10-15-87) IS CHANGED BY LINING OUT THE CURRENT ENTRY FOR TAIWAN AND INSERTING THE FOLLOWING:
"TAIWAN (IN CAPITAL LETTERS) ..... (INCLUDES TAIWAN (FORMERLY CALLED FORMOSA), PENGHU (FORMERLY PESCADORE ISLANDS), AND QUEMOY AND MATSU ISLANDS)"

THESE CHANGES WILL BE INCLUDED IN THE NEXT AVAILABLE PRINTED CHANGE TO 7 FAM.

7. CONCLUSION

THIS GUIDANCE IS PROVIDED AS ONE OF THE INSTRUCTIONS PROMISED IN REFTEL TO ASSIST CONSULS IN IMPLEMENTING THE CHANGES IN PROCEDURES CAUSED BY

RECENT LEGISLATION. CONSULS SHOULD BE ADVISED THAT THE IMMIGRATION AND NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994 WHICH WAS ALSO DISCUSSED IN REFTEL HAS BEEN ENROLLED AS PUBLIC LAW 103-416.

8. *MINIMIZE* CONSIDERED.
CHRISOTPHER

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NNNN

United States Department of State
Washington, D.C.
Nov – 7 1994

Passport Bulletin 94-12

TO: CA/PPT-All Regional Directors
All Supervisory Personnel
All Public Contact Personnel
All Systems Administrators
All Staff Members

FROM: CA/PPT-Barry J. Kefauver
Deputy Assistant Secretary
Passport Sérvices

SUBJECT: Taiwan as a Place of Birth in Passports

On October 25, 1994, President Clinton signed Public Law 103-415 which says the Secretary of State shall write "Taiwan" as place of birth in a passport when requested to do so by applicants born there. Passport agencies will begin doing so immediately.

Please have your passport agency's Systems Administrator enter the following MRP birthplace code and corresponding state name in your computer's birthplace code table.

Birthplace Codes	State Name
TWN	"Taiwan"

Please note that although issuing offices may now enter "Taiwan" as a place name in the computer

birthplace code table, the United States does not officially recognize Taiwan as a state.

When an applicant writes "Taiwan" as a place of birth on his/her application, print "Taiwan" as the place of birth on his/her passport after confirming, by examining citizenship evidence or other documentation, that the applicant's city of birth is on one of the following islands: the island of Taiwan (formerly called Formosa), Penghu (formerly Pescadores), Quemoy or Matsu.

NOTE: Passports may not, repeat NOT, be issued showing place of birth as "Taiwan, China"; "Taiwan, Republic of China"; or "Taiwan, ROC". The United States recognizes the government of the People's Republic of China as the sole legal government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China.

An applicant who writes "China" as his/her place of birth will continue to have "China" printed in his/her passport without further checking as long as it is in agreement with the applicant's documentation. An applicant who writes "Taiwan, China" as a place of birth should be contacted to ascertain whether he/she prefers "Taiwan" or "China" as his/her place of birth and the above procedures followed.

Passports that show "China" as a place of birth will not be amended to reflect this new legislation. Applicants with valid passports who wish to show "Taiwan" rather than "China" as a place of birth will have to apply for a new passport using the

appropriate form, two new photographs, and the appropriate fees.

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INFORM CONSULS

E.O. 12356: N/A
TAGS: CPAS, CMGT
SUBJECT: NEWLY SIGNED LEGISLATION: CITIZENSHIP AND NATIONALITY PROVISIONS OF THE IMMIGRATION AND

PAGE 02 STATE 294076 311955Z
NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994 AND THE STATE DEPARTMENT AUTHORIZATION TECHNICAL CORRECTIONS ACT

1. THIS CABLE HAS BEEN CLEARED BY EUR /NCE, EUR/SCE, AND FMP/MP/SEP. .

2. SUMMARY:

ON OCTOBER 25, 1994 PRESIDENT CLINTON SIGNED INTO LAW THE IMMIGRATION AND NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994 (HEREINAFTER REFERRED TO AS THE ITCA) AND HR 5034 THE STATE DEPARTMENT AUTHORIZATION TECHNICAL CORRECTIONS ACT (HEREINAFTER REFERRED TO AS HR

5034). THIS CABLE WILL ADDRESS THE CITIZENSHIP RELATED PROVISIONS CONTAINED IN THE ITCA AND THE PROVISION FOR LISTING TAIWAN AS A PLACE OF BIRTH IN U.S. PASSPORTS CONTAINED IN HR 5034.
THE ITCA CONTAINS FOUR PROVISIONS OF PARTICULAR INTEREST.

TO THE AMCIT COMMUNITY ABROAD. ONE PROVISION WILL ENABLE CHILDREN BORN ABROAD PRIOR TO MAY 24, 1934 TO ALIEN FATHERS AND AMERICAN CITIZEN MOTHERS WHO HAD RESIDED IN THE U.S. TO ACQUIRE UNITED STATES CITIZENSHIP. ANOTHER SECTION PROVIDES FOR THE EXPEDITIOUS NATURALIZATION OF CHILDREN BORN WHO DID NOT ACQUIRE U.S. CITIZENSHIP AT BIRTH. THE THIRD PROVISION ALLOWS THE RESUMPTION OF U.S. CITIZENSHIP BY FORMER CITIZENS WHO LOST THEIR NATIONALITY BY FAILING TO COMPLY WITH THE FORMER

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RETENTION REQUIREMENTS OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 AND THE NATIONALITY ACT OF 1940. THE LAST IS THE IMMEDIATE REPEAL OF SECTION 340 (D) INA. OTHER PROVISIONS IN THIS SECTION OF THE ACT CONCERN ADMINISTRATIVE DETERMINATIONS OF LOSS OF NATIONALITY, CAN-

CELLATION BY THE DEPARTMENT OF U.S. PASSPORTS AND CONSULAR REPORTS OF BIRTH, CHANGES IN THE WAIVER OF GOVERNMENT KNOWLEDGE, U.S. HISTORY, AND ENGLISH LANGUAGE REQUIREMENTS FOR NATURALIZATION, AND CHANGES IN TERMINOLOGY RELATING TO EXPATRIATION.

HR 5034 STATES THAT THE SECRETARY OF STATE SHALL LIST "TAIWAN" AS THE PLACE OF BIRTH IN U.S. PASSPORTS WHEN REQUESTED TO DO SO BY APPLICANTS BORN THERE. END SUMMARY.

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3. EQUAL TREATMENT OF WOMEN IN CONFERRING CITIZENSHIP TO CHILDREN BORN ABROAD

SECTION 101 OF THE ITCA ALLOWS FOR THE ACQUISITION OF U.S. CITIZENSHIP BY CHILDREN BORN ABROAD PRIOR TO MAY 24, 1934 TO U.S. CITIZEN MOTHERS WHO HAD RESIDED IN THE U.S., AND ALIEN FATHERS. THIS PROVISION IF THE LAW IS EFFECTIVE IMMEDIATELY. STATE 081935, DATED MARCH 30, 1994, IS RESCINDED. THOSE POSTS FORWARDING THESE CASES TO THE DEPARTMENT AS REQUIRED BY THAT CABLE SHOULD STOP. POSTS SHOULD ADJUDICATE THESE CASES IN THE SAME MANNER AS THOSE

CHILDREN BORN TO AMCIT FATHERS, BEARING IN MIND THAT WITH RESPECT TO THESE CASES THAT THE
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RETENTION REQUIREMENTS NOT THE TRANSMISSION REQUIREMENTS HAVE BEEN WAIVED. SHOULD POSTS HAVE PARTICULAR QUESTIONS REGARDING THE INTERPRETATION OF THIS STATUTE, PLEASE REFER THOSE QUESTIONS TO CA/OCS. QUESTIONS AND RESPONSES WHICH MAY BE OF ASSISTANCE TO CONSULS WILL BE PROVIDED TO ALL POSTS. THE ACTUAL TEXT OF THIS SECTION IS PROVIDED BELOW:

"SEC. 101 EQUAL TREATMENT OF WOMEN IN CONFERRING CITIZENSHIP TO CHILDREN BORN ABROAD.

(A) IN GENERAL – SECTION 301 OF THE IMMIGRTION AND NATIONALITY ACT (8 U.S.C. 1401) IS AMENDED –

(1) BY STRIKING THE PERIOD AT THE END OF PARAGRAPH (G6 AND INSERTING "AND", AND

(2) BY ADDING AT THE END THE FOLLOWING NEW PARAGRAPH:

(H) A PERSON BORN BEFORE NOON (EASTERN STANDARD TIME) MAY 24, 1934, OUTSIDE THE LIMITS AND JURISDICTION OF THE UNITED STATES OF AN ALIEN FATHER AND A MOTHER WHO IS A CITIZEN OF THE UNITED STATES WHO, PRIOR TO THE BIRTH OF SUCH PERSON, HAD RESIDED IN THE UNITED STATES.

(B) WAIVER OF RETENTION REQUIRE-MENTS. ANY PROVISION OF LAW (INCLUDING SECTION 301 (B) OF THE IMMIGRATION AND NATIONALITY ACT (AS IN EFFECT BEFORE OCTOBER 10, 1978), AND THE PROVISOS OF SECTION 201(G) OF THE NATIONALITY ACT OF 1940) THAT PROVIDED FOR A PERSON'S LOSS OF CITIZENSHIP OR NATIONALITY IF THE PERSON FAILED TO COME

PAGE 05 STATE 294076 311955Z

TO OR RESIDE OR BE PHYSICALLY PRESENT IN THE UNITED STATES SHALL NOT APPLY IN THE CASE OF A PERSON CLAIMING UNITED STATES CITIZENSHIP BASED ON SUCH PERSON'S DESCENT FROM AN INDIVIDUAL DESCIBED IN SECTION 301(H) OF THE IMMIGRATION AND NATIONALITY ACT (AS ADDED BY SUBSECTION (A)).

(C) RETROACTIVE APPLICATION – (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) THE IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES SHALL BE APPLIED (TO PERSON BORN BEFORE, ON, AND AFTER THE DATE OF THE ENACTMENT OF THIS ACT) AS THOUGH THE AMENDMENT MADE BY SUBSECTION (A), AND SUBSECTION (B), HAD BEEN IN EFFECCT AS OF THE DATE OF THEIR BIRTH, EXCEPT THAT THE RETROACTIVE APPLICATION OF THE AMENDMENT AND THAT SUBSECTION SHALL NOT AFFECT THE VALIDITY OF CITIZENSHIP OF ANYONE WHO HAS OBTAINED CITIZENSHIP UNDER SECTION 1993 OF THE REVISED STATUTES (AS IN EFFECT BEFORE THE ENACTMENT OF THE ACT MAY 24, 1934 (48 STAT. 797)).

(2) THE RETROACTIVE APPLICATION OF THE AMENDMENT MADE BY SUBSECTION (A), AND SUBSECTION (B), SHALL NOT CONFER CITIZENSHIP ON, OR AFFECT THE VALIDITY OF ANY DENATURALIZATION, DEPORTATION, OR EXCLUSION ACTION AGAINST, ANY PERSON WHO IS OR WAS EXCLUDABLE FROM THE UNITED STATES UNDER SECTION 212(A)(3)(E) OF THE IMMIGRATION AND NATIONALITY ACT (8 U.S.C. 1182(A)(3)(E)) (OR PREDECESSOR PROVISION) OR WHO WAS EXCLUDED FROM, OR WHO WOULD NOT HAVE BEEN ELIGIBLE FOR ADMISSION TO, THE UNITED STATES

UNDER THE DISPLACED PERSON ACT OF 1948 OR

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UNDER SECTION 14 OF THE REFUGEE RELIEF ACT OF 1953.

(D) APPLICATION TO TRANSMISSION OF CITIZENSHIP. – THIS SECTION, THE AMENDMENTS MADE BY THIS SECTION, AND ANY RETROACTVE APPLI

AMERICAN INSTITUTE IN TAIWAN
TAIPEI OFFICE

Memorandum

Date: November 7, 1994

To: ACS Staff

From: Charles Bennett, TSS Deputy (CB)

Subject: Listing Taiwan as Place of Birth on U.S. Passports and Reports of Birth

Recently passed U.S. legislation now permits the listing of Taiwan as the place of birth in U.S. passports. The law reads "Effective immediately applicants for U.S. passports or Consular Reports of Birth Abroad (CRBA) who were born in Taiwan may request that Taiwan be listed as the place of birth in that document. (Passports will list "Taiwan" as the place of birth, and CRBA will show "(City of Birth), Taiwan" as the place of birth." For this purpose, "Taiwan" includes Taiwan proper (formerly called Formosa), Penghu (formerly called Pescadore Islands), Quemoy and Matsu.

To reduce any confusion, ACS staff should review passport applications very carefully. Applicants who write anything but "Taiwan" or "China" (e.g. "Taiwan, China," "Taiwan, Republic of China," or "Taiwan, ROC") should be asked which of the two he/she prefers listed as a place of birth in the passport, and then the application should be modified accordingly (modification should be made by the applicant only, and not by ACS staff). ACS

staff should only provide the above information, and should not recommend or suggest one option or another. The above information holds true for individuals who wish to modify a currently valid passport. If there is any question as to the applicant's true place of birth, additional documentary evidence should be requested, or the applicant should complete an affidavit stating his/her birth place is Taiwan. Any questions concerning these changes should be referred to the American supervisor.

CC: AIT/K

Amconsul Hong Kong

PASSPORT SERVICES
INSTRUCTION

Date: February 25, 1993

TO: All Passport Services Staff Members

FROM: Acting Deputy Assistant Secretary for Passport Services

SUBJ: Birthplaces to be Written in Passports

1. PURPOSE. This instruction provides policy for writing and applicant's place of birth in a passport. It updates the Birthplace Guide list attachment.

2. RESPONSIBILITIES. Adjudicators shall determine the proper birthplace to be written in the passport and write the corresponding birthplace code on the application. Refer requests for the use of a place of birth not listed in the Birthplace Guide to the Adjudication Chief or Branch Chief.

3. POLICY. Write the state, country or area of birth, as appropriate, in the passport as shown in the attached Birthplace Guide; the approved entries and birthplace codes are listed in capital letters. Enter the corresponding birthplace code shown in the Guide in the place of birth field on the CRT. In some cases, the city or town of birth may be written

in the passport (see sections 3D (2) and 3D (7)).

A. Birth in the Fifty States and the District of Columbia. Write the name of the state, followed by "U.S.A.," in the passport as shown in Section I of the Guide. For persons born in the District of Columbia, write **"WASHINGTON, D.C., U.S.A."** The passport application should show both the city or county and the state of birth.

B. Birth in U.S. Territories and Outlying Areas. Write the name of the territory or possession, as shown in Section II of the Guide, in the passport as the place of birth. Write "U.S.A." only after Guam, Puerto Rico **and the Northern Mariana Islands.**

C. Birth Outside the United States. As a general rule, write the country of birth as it is now known, using the spelling shown in Section II of the Guide.

3. D. Special Cases.

(1) Areas Which Were Formerly Part of Another Country. The Country of birth shown on the application may normally be written in the passport if it is an acceptable place of birth listed in the Guide. However, if there is a question as to what country now has sovereignty over the

actual place of birth, the adjudicator should determine the country having present sovereignty and change the application if necessary. This often occurs when an applicant was born in part of a country (for example, Germany) which the U.S. recognized as having been subsequently annexed by another country (for example, Poland).

(2) The Former U.S.S.R. For a person born in an area which was formerly part of the Union of Soviet Socialist Republics, determine the name of the republic as presently known. Do not write U.S.S.R. Be careful to distinguish between the state of Georgia in the United States (birthplace code GA) and the independent republic of Georgia (birthplace code GEO). Also, when an application shows Armenia as the birthplace, determine whether the actual place of birth is in the independent republic of Armenia, or is part of the region known as Armenia which includes parts of Turkey and Iran.

(3) Countries Formerly Part of Yugoslav. For a person born in an area which was formerly part of Yugoslavia, do not write Yugoslavia. If the person was born in Bosnia and Herzegovina, Croatia or Slovenia, write the name of the independent country as presently known. If the person was born in Serbia, Montenegro or the formerly Yugoslavia

part of Macedonian, write the city or town of birth as the birthplace in the passport. If the applicant states the birthplace as Macedonia, determine whether the actual place of birth is in the former Yugoslavia, Greece, Albania or Bulgaria.

(4) Countries Formerly Part of Czechoslovakia. For a person born in an area which was formerly part of Czechoslovakia, do not write Czechoslovakia. If the person was born in one of the former provinces of Bohemia, Moravia or the Sudetenland, write Czech Republic as the place of birth. If the person was born in the former province of Slovakia. Write Slovakia as the place of birth.

(5) Birth at Sea. If birth or citizenship documents show that birth occurred at sea, and no country has sovereignty over the area if birth, write "AT SEA" as the birthplace in the passport.

(6) Birth in the Air. If birth or citizenship documents show that birth occurred in the air, and no country has sovereignty over the area of birth, write "IN THE AIR" as the birthplace in the passport. **[NOTE: The airspace above the land and the territorial waters of a sovereign country is considered to be part of that country. A child born in an airplane flying through that airspace is considered to have been born in that country.]**

D. (7) Israel, Jerusalem, and Israeli-Occupied Areas.

(a) General Policy. As a result of the June 1967 Arab-Israeli War, Israel now occupies and administers the Golan Heights, The West Bank, and the Gaza Strip. U.S. Policy holds that the Golan Heights is Syrian territory, and that the West Bank and the Gaza Strip are territories whose final status must be determined by negotiations. The birthplace that should appear on passports whose bearers were born in the Golan Heights is SYRIA. The birthplace for people born in the West Bank or in the No Man's Land between the West Bank and Israel is WEST BANK; and for people born in the Gaza Strip the birthplace is GAZA STRIP.

Write ISRAEL as the place of birth in the passport if and only if the applicant was born in Israel itself (this does not include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the No Man's Land between the West Bank and Israel).

For a person born in Jerusalem, write JERUSALEM as the place of birth on the passport. Do not write Israel, Jordan or West Bank for a person born within the current municipal borders of Jerusalem.

(b) Alternate Entries. An applicant born in the area formerly known as Palestine

(which includes the Gaza Strip, the Golan Heights, Jerusalem or the West Bank) may object to showing the birthplace as outlined in section 3D(5) (a). In such cases, explain our general policy of showing the birthplace as the country having present sovereignty. The Adjudication Chief or Branch Chief may make an exception to show PALESTINE as the birthplace if the applicant was born before 1948. If the applicant was born in 1948 or later, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty.

For a person born before May 14, 1948 *in a place that was outside Jerusalem's municipal limits and later was annexed by the city, either* PALESTINE or the name of the location (area or city) as it was known before annexation may be used as an alternate entry. For a person born after May 14, 1948 in a place that was outside Jerusalem's municipal limits and later was annexed by the city the alternate entry is the name of the location (area or city) as it was known before annexation.

3. D. (7)

Area Name	Birthplace	Alternate Entry
Gaza Strip	GAZA STRIP	PALESTINE (if born before 1948); city or town of birth (if born in 1948 or after)
Golan Heights	SYRIA	City or town of birth
Israel	ISRAEL	PALESTINE (if born before 1948); city or town of birth (if born in 1948 or later)
Jerusalem	JERUSALEM	PALESTINE (if born before 1948); city or area of birth (if born in area which was later annexed by Jerusalem)
West Bank	WEST BANK	PALESTINE (if born before 1948); city or town of birth (if born in 1948 of later)

(8) Birth in the Former Canal Zone. For a person born in the former Canal Zone on or after October 1, 1979, the place of birth in the passport must be listed as Panama. For a person born before October 1, 1979, write Panama as the place of birth; however, if the applicant objects, Canal Zone may be listed as the place of birth. If the applicant also objects to Canal Zone as the place of birth, the city or town of birth may be listed.

(9) City of Birth Listing. A U.S. citizen born abroad may choose to list the city or town of birth rather than the country if he or she objects to the country listing as set forth in the Birthplace Guide. The name of the city or town of birth printed in the passport will be the name at the date if the applicant's birth of the current name. Refer requests for verification of the proper city name to be listed to the Agency Adjudication Chief or Branch Chief. Write out the city or town in the POB field on the CRT (up to a maximum of 24 characters) as there are no standard codes for city birthplaces.

Give applicants who choose the city or town designation Form M-397 to advise them of difficulties which they might encounter in travelling to, or obtaining visas for certain foreign countries. If an applicant later requests a new passport showing the country of birth, the applicant must pay the normal fee(s) for the new passport.

3. E. Questions About Birthplaces or Passport Services Policy on Birthplaces. Technical questions about the location of a particular area of birth or about the correct spelling of a city or town should be referred to the Office of the Geographer (INR/GE). Questions about Passport Services' policy on birthplaces should be directed to the Field Coordination Staff (PPT/FC).

4. DIRECTIVE(S) CANCELLED

Instruction 2500.5H dated May 10, 1987.
Passport Bulletin 92-1 dated January 22, 1992.
Passport Bulletin 92-10 dated June 3, 1992.
Passport Bulletin 92-16 dated August 10, 1992.
Passport Bulletin 92-17 dated August 10, 1992.
Passport Bulletin 92-18 dated August 13, 1992.
Passport Bulletin 92-26 dated December 15, 1992.
Passport Bulletin 93-1 dated January 6, 1993.

5. EFFECTIVE DATE. Immediately.

Attachment:
As Stated.

TAIWAN AS PLACE OF BIRTH ON U.S. PASSPORTS

Question:

The Foreign Relations Authorization Act has a provision requiring the Secretary of State, if U.S. passport holders request, to reflect "Taiwan" as place of birth. When will the State Department begin complying with this requirement?

Answer:

° We will have to carefully assess our position in this matter

- o As we have previously indicated, there are substantial policy reasons why we think Taiwan should not be inscribed in U.S. passports as place of birth.
- o I would like to indicate some of the reasons why we think this legislation would be wrong.
  - It is established United States policy worldwide to inscribe in U.S. passports the country of birth as the country is currently known. This policy is not peculiar to Taiwan.
  - Since 1945, the place of birth in the passport of a U.S. citizen, whether born on Taiwan or on the Chinese mainland, has been entered as "China."
  - This is consistent with our worldwide policy, and it is consistent with the United States' one-China policy, as we acknowledge the Chinese position that there is but one China and Taiwan is a part of China.

- Since U.S. passports are official foreign policy documents of the U.S., entering "Taiwan" as the country of birth could be construed as a U.S. reversal of its recognition of the PRC as the sole legal government of China in the three U.S. – PRC joint communiques.
  - Such a move would gain the U.S. nothing and would have a negative effect on our relations with the PRC and Taiwan. At the very least, use of such an entry would probably cause substantial problems and delays for Taiwan- born U.S. citizens withing to enter the PRC (and possibly other countries).
- Furthermore, permitting use of "Taiwan" as the country of birth could also offer legal precedent for others wishing to enter as their country of birth other entities which the U.S. does not wish to appear to recognize as independent or sovereign, and there are potentially a large number of these entities.

UNCLAS 0 OSAKA KOBE 01083

Lasers:

ACTION: TSS
INFO: XEROX-4 DIR DDIR
DISSEMINATION: TSS
CHARGE: PROG

VZCZCINO163
RR RUEHIN
DE RUEHOK #1083 3050600
ZNR UUUUU ZZH
R 010600Z NOV 95
FM AMCONSUL OSAKA KOBE
TO RUEHIN/AIT TAIPEI 0029
INFO RUEHKO/AMEMBASSY TOKYO 2448
RUEHC/SECSTATE WASHDC 2510
RUEHKON/AMCONSUL NAGOYA 0663
RUEHKOS/AMCONSUL SAPPORO 0986
RUHBBMA/AMCONSUL NAHA 0997
RUEHKOF/AMCONSUL FUKUOKA 0994
RUEHBJ/AMEMBASSY BEIJING 0125
BT
UNCLAS OSAKA KOBE 001083

E.O. 12356: N/A
TAGS: CASC, CPAS, JA, TW, CH

SUBJECT: REQUEST FOR ADVICE ON POB AS TAIWAN

1. POST RECENTLY ISSUED A REPLACEMENT PASSPORT O AN AMERICAN CITIZEN F CHINESE ETHNICITY BORN ON TAIWAN,

CARRYING A U.S. PASSPORT SHOWING HER PLACE OF BIRTH AS TAIWAN. THE APPLICANT ASKED FOR A NEW PASSPORT SHOWING POB AS "CHINA", AFTER BEING TOLD THAT THE CIHNESE EMBASSY IN TOKYO WOULD NOT ISSUE A VISA UNLESS HER PASSPORT SHOWED POB AS CHINA. POST CANCELED THE OLD PASSPORT AND ISSUED A NEW BOOK PER THE APPLICANT'S REQUEST. THE CHINESE EMBASSY CONSULAR SECTION CONFIRMED TO AMEMBASSY TOKYO BY PHONE THAT THEIR POLICY IS NOT TO ISSUE VISAS TO AMERICANS WHOSE PASSPORTS LIST POB AS TAIWAN. THE CHINESE CONSULATE IN OSAKA STATED THAT THEY HAVE NO SUCH RESTRICTION.

2. POST WOULD APPRECIATE ADVICE FROM AIT ON YOUR EXPERIENCE WITH POB AS TAIWAN, SO THAT WE CAN ADVISE OTHER AMERICANS BORN ON TAIWAN SEEKING PASSPORT SERVICES HERE.

PABST
BT
#1083

UNCLAS OSAKA KOBE 01083

UNCLAS BEIJING 46327

Lasers:

ACTION: TSS

INFO: XEROX-4 DIR DDIR

DISSEMINATION: TSS
CHARGE: PROG

VZCZCINO434
RR RUEHIN
DE RUEHBJ #6327 3060928
ZNR UUUUU ZZH
R 020928Z NOV 95
FM AMEMBASSY BEIJING
TO RUEHIN/AIT TAIPEI 8916
RUEHOK/AMCONSUL OSAKA KOBE 0115
INFO RUEHHK/AMCONSUL HONG KONG 6093
RUEHKOF/AMCONSUL FUKUOKA 0236
RUEHC/SECSTATE WASHDC 6900
RUEHSH/AMCONSUL SHENYANG 1725
RUEHKOS/AMCONSUL SAPPORO 0213
RUESLE/AMCONSUL SHANGHAI 7904
RUEHKO/AMEMBASSY TOKYO 5986
RUEHGZ/AMCONSUL GUANGZHOU 9003
RUHBBMA/AMCONSUL NAHA 0092
ZEN/AMCONSUL CHENGDU
BT
UNCLAS BEIJING 046327

OSAKA FOR CONS

DEPT FOR EAP/CM

E.O. 12356: N/A
TAGS: CASC CH
SUBJECT: POB AS TAIWAN
REP: (A) OSAKA KOBE 1083 (NOTAL)
(B) 94 STATE 299832 (NOTAL)

1. REFTEL A REPORTED THE OSAKA-KOBE PRC CONSULATE'S REFUSAL TO ISSUE A VISA IN A US PASSPORT SHOWING TAIWAN AS THE POB.

2. IN BEIJING, WE HAVE ENCOUNTERED SIMILAR REPORTS FROM AMCITS WHO INFORMED US THEY HAD DIFFICULTY OR WERE UNABLE TO OBTAIN PRC VISAS FROM THE PRC EMBASSY IN WASHINGTON DUE TO THE APPEARANCE OF TAIWAN AS POB IN A US PASSPORT. INTERESTINGLY, WE HAVE NOT HAD REPORTS OF PRC OFFICIALS IN BEIJING RAISING THIS QUESTION WITH AMCITS WHO HAVE OBTAINED REPLACEMENT VISAS OR ALIEN RESIDENT REGISTRATION CARDS. THIS IS DESPITE THE FACT THAT WE SEE MANY US PASSPORTS HERE IN WHICH THE POB IS SHOWN AS TAIWAN. (COMMENT: THE PUBLIC SECURITY BUREAU WHICH IS RESPONSIBLE FOR VISA ISSUANCE HERE MAY BE LESS

SENSITIVE TO THIS ISSUE THAN THE MFA'S CONSULAR OFFICERS AT PRC EMBASSIES AND CONSULATES ABROAD. END COMMENT.)

3. AS INSTRUCTED REFTEL B, WHENEVER WE ISSUE A PPT TO AN AMCIT BORN IN TAIWAN, WE ALLOW HIM OR HER THE CHOICE OF TAIWAN OR/OR CHINA, WHILE ADVISING OF POSSIBLE COMPLICATIONS ARISING FROM PRC VISA POLICIES.

HALLFORD
BT
#6327
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UNCLAS BEIJING 46327

Congress of the United States
House of Representatives
Washington, DC 20515
June 5, 1995

The Honorable Warren Christopher
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

Last October 25th, President Clinton signed into law legislation containing an amendment that permitted Taiwanese Americans to list "Taiwan" as their place of birth in their American passports instead of "China." Many Taiwanese subsequently renewed their passports in order to have "Taiwan" so listed.

Recently, we were informed that several Taiwanese Americans in Chicago, New York and Los Angeles, who intended to travel to the People's Republic of China, were denied entry visas. They were told that their visas were denied because "Taiwan" was listed as their place of birth. Applicants were encouraged to change their place of birth to "China" in order to receive a visa.

Since we were directly involved in drafting the language of this amendment in last year's State Department Technical Corrections Bill -- the framework for this change in U.S. policy -- we would appreciate any information that you can provide us concerning the steps the Department of State has taken to preserve the integrity of the American

passport, our reciprocal consular agreements with the Chinese and whether or not this issue has been raised with appropriate Chinese officials.

We look forward to hearing from you.

Sincerely,

/s/
HOWARD L. BERMAN
Member of Congress

/s/
PETER DEUTSCH
Member of Congress

/s/
CLAIBORNE PELL
U.S. Senator

(b) PARKING— The Department of State shall also make available adequate parking for members and staff of the congressional committees of jurisdiction in order to facilitate attendance of meetings at the Department of State.

SEC. 130. REPORT ON SAFETY AND SECURITY OF UNITED STATES PERSONNEL IN SARAJEVO.

Not later than 90 days after the date of enactment of this Act, the Secretary of State shall report to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate on the steps taken to enhance the security and physical safety of United States diplomatic personnel in Sarajevo, Bosnia-Hercegovina.

Sec. 131. PASSPORT SECURITY.

(a)SENSE OF CONGRESS – The congress strongly urges the Secretary of State to ensure that any new passport issuances should, to the maximum extent practicable—

(1) be secure against counterfeiting, alteration, duplication, or simulation;

(2) be easily verifiable with appropriate inspection by public officials and private and commercial personnel; and

(3) contain only United States-sourced materials and technology.

(b)REPORT TO CONGRESS— Not later than 30 days after the date of enactment of this Act, the Secretary of State shall submit a report to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives detailing actions taken by the Department of State to accomplish the goals set forth in subsection (a).

SEC. 132. RECORD OF PLACE OF BIRTH FOR TAIWANESE-AMERICANS. (22 USC 2705 note.)

For purposes of registration of birth or certification of nationality [*or issuance of a passport*] of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan.

SEC. 133. TERRORISM REWARDS AND REPORTS

(a)REWARDS FOR INFORMATION ON ACTS OF INTERNATIONAL TERRORISM IN THE UNITED STATES

(1) STATE DEPARTMENT BASIC AUTHORITIES ACT OF 1958-- Section 36 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2708) is amended in subsection (a) by striking "and is primarily outside the territorial jurisdiction of the United States".

(2) Notwithstanding section 36(g) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2708), in addition to amounts otherwise available

the Department of State may expend not more than $4,000,000 in fiscal years 1994 and 1995 to pay rewards pursuant to section 36(a) of such Act.

(b) ANNUAL REPORTS ON TERRORISM—

(1) Section 140 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 26561) is amended in subsection (b)(2)—

(A) by striking "and" at the end of subparagraph (C);
(B) by striking the period at the end of subparagraph (D) and inserting "; and ;" and
(C) by adding at the end of the following:

UNCLAS TAIPEI 06423

Lasers:

ACTION: TSS
INFO: GAS XEROX-4 DIR DDIR

DISSEMINATION: TSS
CHARGE: PROG

APPROVED: TSS: JDMORRIS
DRAFTED: TSS: LMECOLA
CLEARED: TSS: CEBENNETT

VZCZCINI275
RR RUEHC RUEHOK RUEHHK RUEHGZ
RUEHKO RUEHSH RUEHBJ RUEHKOS
RUEHKOF RUHBBMA RUESLE
DE RUEHIN #6423. 3130924
ZNR UUUUU ZZH
R 090924Z NOV 95
FM AIT TAIPEI
TO RUEHC/SECSTATE WASHDC 2891
RUEHOK/AMCONSUL OSAKA KOBE 0027
INFO RUEHHK/AMCONSUL HONG KONG 7005
RUEHGZ/AMCONSUL GUANGZHOU 6117
RUEHKO/AMEMBASSY TOKYO 3554
RUEHSH/AMCONSUL SHENYANG 2493
RUEHBJ/AMEMBASSY BEIJING 5551
RUEHKOS/AMCONSUL SAPPORO 0028
RUEHKOF/AMCONSUL FUKUOKA 0032
RUHBBMA/AMCONSUL NAHA 0140
RUESLE/AMCONSUL SHANGHAI 4273
BT
UNCLAS TAIPEI 006423

DEPT FOR TO EAP/CM, EAP/RSP/TC AND
CA/OCS/ACS
DEPT PASS TO AIT WASHINGTON, BEIJING
PASS CHENGDU

E.O. 12958: N/A
TAGS: CASC, TW, CH
SUBJECT: POB AS TAIWAN

REF: A) OSAKA KOBE 1083, B) BEIJING 46327

1. AT PRESENT, APPROXIMATELY ONE-THIRD OF OUR U.S. PASSPORT APPLICANTS BORN HERE CHOSE TAIWAN AS POB. SOME AMCITS HAVE INDICATED THEY ARE PLEASED TO BE ABLE TO LIST TAIWAN, WHILE OTHERS HAVE EXPRESSED MISGIVINGS AT POSSIBLE PROBLEMS IN OBTAIN-ING A PRC VISA.

2. THUS FAR, WE HAVE HAD ONLY TWO APPLICANT REQUESTS FOR REISSUANCE OF A PASSPORT WITH CHINA AS PLACE BIRTH BECAUSE OF PROBLEMS WITH THE PRC. BOTH WERE FROM FATHERS OF U.S. CITIZEN CHILDREN. ONE INDICATED HE HAD APPLIED FOR A VISA TO MAINLAND CHINA FOR HIS DAUGHTER AND BEEN REFUSED; THE SECOND HAD NOTED THAT HIS FIRST CHILDS PASSPORT SAID CHINA, AND HE WANTED THE TWO TO SHOW THE SAME POB.

3. ONE REASON WE HAVE RECEIVED FEW COMPLAINTS REGARDING PRC VISA PRACTICES MAY BE BECAUSE THERE IS, OF COURSE, NO PRC VISA-ISSUING ATHORITY IN

TAIWAN. MOST AMCITS TRAVELING TO MAINLAND CHINA APPLY FOR VISAS THROUGH THEIR TRAVEL AGENTS OR DIRECTLY IN HONG KONG.

4. POST MAY ALSO WANT TO BEAR IN MIND THAT A THIRD OPTION EXISTS, I. E. USING THE CITY AS POB. THE FAM PERMITS AN APPLICANT WHO OBJECTS TO THE COUNTRY LISTING TO REQUEST THAT THE CITY NAME BE USED INSTEAD. VERY FEW PEOPLE CHOSE THIS OPTION IN TAIWAN, HOWEVER, AND WE HAVE HAD NO FEEDBACK ON HOW IT MAY BE VIEWED IN PRC VISA APPLICATIONS.

5. FOR DEPARTMENT: WHILE ISSUANCE OF A SECOND PASSPORT IN CASE OF A VISA DENIAL BY THE PRC DOES NOT APPEAR TO BE ADRESSED SPECIFICALLY IN 7 FAM 1314.2, THE DEPARTMENTS CLARIFICATION OF THIS POINT WOULD BE APPRECIATED. WE HAVE NOT RECEIVED ANY SUCH REQUESTS FOR A SECOND PASSPORT, BUT ANTICIPATE WE MAY AT SOME POINT.
PASCOE
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UNCLAS TAIPEI 06423

DEPARTMENT OF STATE
AIRGRAM

HANDLING	CLASSIFICATION	MESSAGE REFERENCE NO.
	UNCLASSIFIED	A-0159

TO: ALL DIPLOMATIC AND CONSULAR POSTS

ATTENTION: CONSULS
FROM: Department of State (CA/PPT)
E.O.II652: N/A
TAGS: CPAS: (Worldwide)
SUBJECT: Proposed Revision of U.S. Passport Identifying Data (PPT 10-2 Passport Format)
REF: A-5619 of November 19, 1976

Although the study of this question is incomplete due to the failure of some governments to reply, we have been able to reach a decision based on the facts now before the Department.

A collation was made of the replies to the three questions (set forth in A-5619 of November 19, 1976) concerning the acceptability of United States passports which could not contain a "place of birth" (POB).

On December 22, 1977 a Report on various Bills (H.R. 950, H.R. 2391 and H.R. 3064) relating to "POB" in U.S. passports was sent to the Honorable Clement J. Zablocki, Chairman of the House Committee on International Relations, setting forth

the Department's position opposing legislation which would delete the "POB".

Pertinent excerpts from the Report below:

> "No responses were received from forty-six (46) countries. These failures to respond can only be related to an unwillingness or an inability of those governments to reply. In either case they must be considered equivocal, if not negative, in relation to the Department's ability to advise American travelers concerning entry into those countries.
>
> "Twenty-two (22) countries unequivocally stated that passports without "POBs" would be acceptable and no problems for U.S. citizens would result therefrom. The responses from two of those countries are questionable in light o their internal procedures for the strict regulation of all persons, including their own citizens, who attempt to enter and depart their countries.
>
> "Thirty-five (35) countries would accept passports without "POBs" but with qualifications. Some thought they really should be there and that removal of "POBs" would be an error. Almost half noted that it wouldn't matter since the "place of birth" must be given in their visa application forms and/or in their Disembarkation/Embarkation cards. Another group would make no commitment that there would not be delays or problems for the bearers of such passports.

"Five (5) countries gave equivocal responses without committing themselves either way.

"Twenty-seven (27) countries responded that they would not accept passports which do not contain the "place of birth". Thus, United States citizens bearing such passports would be denied entry Into those countries. This group of countries includes six (6) countries to which hundreds of thousands of U.S. citizens travel every year (France, Federal Republic of Germany, Greece, Israel, Italy, and Spain). It also includes other countries to which many thousands of U.S. citizens travel each year (Argentina, Brazil, Finland, Iran, Jamaica, Panama, and Peru). ... Essentially their refusals are based on: (1) the requirements of their domestic laws, (2) the essential items for an individual's identification, and (3) security considerations.

"Even excluding the 46 countries which did not respond, there are at least 67 countries to which U.S. citizens could not travel for fear of denial of entry if they bear passports which do not contain "places of birth" (27 of them for sure).

"A major purpose of passports is to protect their bearers and assist them in crossing international borders. If the document is so devised that it does not assist United States citizens in crossing international borders but rather, because of its inadequacies, causes

difficulties, it does not accomplish a major purpose for which it was conceived.

"The Department has consistently demanded equality of treatment of all citizens of the United States when traveling abroad. However, there are limits to achieving that equality which are imposed by factors beyond the power of the United States to alter unilaterally. Dual nationality is a prime example. The United States, like every other sovereign state, has the sole authority to determine which persons are or are not its citizens. Although the United States rejects the principle of dual nationality as a matter of policy, it does accept its existence in individual cases as a matter of fact resulting from the conflicting nationality laws of other sovereign states.

"A U.S. citizen who is a national of another country owes that country his or her primary allegiance while in that other country and the United States is limited in its ability to offer its protection in that situation. Of course, the reverse of those rules applies when a dual national U.S. citizen is in this country.

"Every sovereign nation has the right and the responsibility to determine who possesses its citizenship. The "place of birth" is often a keystone in making such determinations. The United States government cannot demand to exercise its right to make legitimate inquiries to determine whether or not a person is a U.S.

citizen and refuse to recognize the same right in other sovereign states. If persons wish to divest themselves of a former nationality there are procedures which may be utilized in most cases, under the laws of the countries involved or, at times, by treaties. If no such procedures exist, the only way difficulties can be avoided entirely is not to go to the country of one's former nationality.

"Any difficulties or other problems experienced or observed by United States citizens as a result of their foreign birth should be reported immediately to the Department or to one of its posts abroad in order that an investigation can be made and appropriate steps taken with the host government to rectify or clarify any such situation. The Department believes that in most cases such action will be effective and will enable United States citizens to travel from country to country abroad without undue delay or fear of discrimination because he or she was born abroad. The Department is requesting our posts abroad to be alert to any discrimination against such citizens abroad, and to render all appropriate assistance in the even any such situations do arise."

The Department will include the language set forth above in answering inquiries concerning deletion of the "Place of Birth" from U.S. passports together with appropriate introductory and concluding paragraphs. All Posts are requested to use similar language in response to current inquiries in this

subject. The concluding paragraph of each such response should include language to the effect that- "It is the Department's belief that it is in the best interests of all of the American traveling public to retain the Place of Birth in United States passports".

Each Post is requested to forward copies of any incoming and outgoing correspondence in this subject to: "CA/PPT – Attention: Director."

Each Post should be alert to any complaints or charges in this area and initiate appropriate action to discourage and eliminate whenever possible any discrimination which may occur. The Department should be informed immediately of any situations or problems which may arise involving discrimination against United States citizens because they were born abroad.

A summary statement concerning "Place of Birth" in passports will be included in an early revision of 8 FAM.

CHRISTOPHER, ACTING

UNITED STATES GOVERNMENT
Memorandum

TO: PT/L – Mr. Robert D. Johnson

DATE: May 20, 1963

FROM: PT/L – Ethel L. Johnson

SUBJECT: Passports – Place of Birth

In accordance with your memorandum to me of April 11, 1963, I have prepared and attach memorandum relating to the placement in the passport of the bearer's place of birth.

Attachments:

1. Copy of April 11, 1963 memorandum.
2. Subject memorandum
   Original and copies (5).

"PLACE OF BIRTH" INFORMATION IN THE UNITED STATES PASSPORT

The passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily as a part of the identification of the bearer. A search of the precedent files in the Passport Office Library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances.

Executive Order No. 2285
December 15, 1915

This Executive Order stated that "All persons leaving the United States for foreign countries should be provided with passports of the Governments of which they are citizens." The Order also provided that American citizens must make application "in duplicate" to the Secretary of State for passports, but there is no specification as to the inclusion of place of birth, either in the application or in the passport. The Order specified that "Applications shall be made in the manner heretofore prescribed by the rules governing the granting and issuing of passports."

Executive Order of June 13, 1920

The Executive Order of June 13, 1920, on passports provided for Regulations by the Secretary. Departmental Order No. 191 of June 12 (ajc), 1920,

implemented the Executive Order of June 13, but neither Order specified the contents of the passport itself. The Departmental Order however, required that the place and date of birth be in the application for a passport.

Executive Order of February 12, 1926

The Executive Order of February 12, 1926, provided in part as follows:

"Sec. VI. Contents of Application for a Passport.

a. General – Each application for a passport must contain the following:

21. The applicant's name.

22. The names, places and date of birth of other persons to be included in the passport (wife and minor children).

_ _ _ _ _ _ _

24. The place and date of the applicant's birth."

The accompanying Departmental Order No. 366 of February 12, 1926, does not refer to the subject.

Executive Order of January 31, 1928

The Executive Order of January 31, 1928, contains essentially the same requirements as quoted from the Executive Order of February 12, 1926. Departmental Order No. 433-A of January 31, 1928, does not refer to the subject.

Executive Order No. 5860
June 22, 1932

Executive Order No. 5860 of June 22, 1932, contains essentially the same requirements as quoted from the Executive Order of February 12, 1926. Departmental Order No. 538 of June 22, 1932, to accompany Executive Order 5860, does not refer to the subject.

None of these Orders specified the contents of a passport.

Executive Order No. 7856
March 31, 1938

Executive Order No. 7856 of March 31,1938, and the accompanying Departmental Order No. 749 of March 31, 1938 (the present Passport Regulations) likewise contain no provisions or directives of any kind as to what the passport shall contain. The Executive Order provides that the application of a native citizen for a passport shall contain "the place and date of the applicant's birth" and the application for a passport of a person claiming citizenship through naturalization shall contain "the date and place of the applicant's birth." The Order also provides that the application must contain "the names, dates and places of birth of other persons to be included in the passport." **

** For identification of items marked with asterisks, see list of references and their file identifications, following this memorandum.

Thus the Executive Orders and supporting Departmental Orders, from 1915 to the present time, have contained no directives as to the contents of the passport, but only as to the contents of the application for a passport, and in the application the place of birth has been and is required.

The inclusion of place of birth information in the United States passport has been challenged from time to time by applicants who wish it omitted altogether or by those who wish the designation to reflect the name and sovereignty of the country of birth at the time of birth rather than at the time of issuance of the passport.

The precedent files contain flimsies of letters to applicants in both instances. To the former – those who wish the designation deleted entirely – the replies usually contain a paragraph such as the following:

> "The United States passport conforms generally to the so-called international passport, recommended at many international conferences, which calls for the place of origin to be shown in the passport as essential for the proper identification and protection of the passport holder." **

The second class – those who wish the designation to reflect the name and sovereignty of their place of birth as of their date of birth – generally receive a reply incorporating the above quotation, and in addition, an explanation of why the Department adheres to the general practice of designating place

of birth as represented by present sovereignty. While these explanations vary with the facts of each case, the general reply runs something like this:

> "The place of birth, as shown in a passport, is not intended to be an indication of the previous nationality of the bearer, either at the time of birth or at any later date. Our policy is to show the name of the place of birth in a passport as it is commonly known today and provided, of course, it reflects properly the sovereignty recognized by our Government."**

A discussion of these later cases, in selected geographical and political areas, arising after World War II, will be discussed later in this memorandum.

Development and Derivation of the International Passport

The "international passport", referred to in one quotation above, is that form of passport which was recommended in 1920 and following, by a series of Conferences and Resolutions adopted therein under the auspices of the League of Nations.

The first Conference, meeting in Paris in October 1920, was attended by 22 states, 18 of which were members of the League and 4 of which were non-members. One of the resolutions recommended for general adoption was for a uniform type of "ordinary passport" – later to be referred to as "the international passport." The test of the resolution was as follows:

> "1. The establishment of a Uniform type of 'ordinary passport' which will be identical for all countries, in order to facilitate control during the journey, to be issued at the latest by July 1st, 1921 and to supersede all other types." (Bigelow Memorandum, p. 2) **

The sample type of passport proposed provided for date and place of birth of the bearer and of his wife, included in the passport. [2]

The Resolution of October 21, 1921, was forwarded to the member states and certain other countries, including the United States. This Government was requested on November 18, 1920, and again on May 12, 1921, to state agreement or disagreement to any of all of the proposals, but the United States did not reply.

The countries replying and commenting on the recommendation for a uniform passport were 25 agreeing and 3 not agreeing to the recommendation.

The passport problem and travel control matters generally continued to occupy the attention of the League of Nations and its proper Committees during 1921 through 1925. A questionnaire forwarded to Member states, and to this Government, on January 23, 1925, was answered by the United States. The pertinent question on type of passport was:

> "Has your Government adopted the type of passport known as the International? (Recommended by the Paris Passport Conference 1920)."

The United States answer to this question was "No."

(Bigelow Memorandum, Annex B, p. 3) **

NOTE: (At this time the United States had for the past decade included in its passports the place and date of birth of the bearer.)

The answers received from the other nations on this question "showed a trend in the direction of . . . . .uniformity of type of passport." (Bigelow Memorandum, p. 9) **

A second conference under League auspices took place at Geneva May 12-16, 1926, attended by delegates of 38 countries. The United States Government was invited to participate, but was not represented. Summary reports of action taken on the 1926 conference recommendations showed that several nations had continued (or perfected) their plans to adopt the "international passport."

The Bigelow Memorandum (p. 21) contains a "Comparison of American Procedure with Methods Recommended by Passport Conferences of 1920 and 1926", set out in parallel columns, in which it is noted that this Government conformed to the "personal description" item of the "International type of Passport", including "date and place of birth." The Bigelow Memorandum (p. 23) also states:

> "It will be seen that the American passport conforms in most particulars to the 'international' model." **

Designation of Place of Birth in Passport Since World War II

The considerable transfer of territory which has occurred since World War II, especially in Eastern Europe, has resulted in a corresponding increase in requests for redesignation of place of birth in passports issued to persons who were born in the territory transferred.

The general rule followed in such cases is to designate the place of birth by the country holding sovereignty over such place at the time the passport is issued. Thus a person born in the Ukraine would have a passport designating the U.S.S.R. as his place of birth.

Examples of correspondence in these cases follow:

Caucasus:

> "Reference is made to your letter . . . requesting that your place of birth be reflected in your passport as Caucasus instead of U.S.S.R. . . . in order to establish the positive identity of person for passport purposes, we find the best evidence to be a statement of his age, his place of birth and his recent photograph.
>
> "The Department of State follows international practice in setting forth the date and place of birth as necessary elements of identification. The place of birth, as shown in a passport, is not intended to be an indication of the previous nationality of the

bearer, either at the time of birth or at any later date. Our policy is to show the name of the place of birth in a passport as it is commonly known today and provided, of course, it reflects properly the sovereignty recognized by our Government. The office of the Geographer of the Department advises that Caucasus is located in the Union of Soviet Socialist Republics." **

Austria:

"With reference to your request to show your place of birth as Austria, the Department follows an international practice in setting forth the date and place of birth as necessary elements of identification . . . Therefore, your place of birth must be shown as U.S.S.R." **

Egypt:

"The Office of the Geographer of the Department advises that Alexandria was located in Egypt at the time of your birth in 1922. After February 28, 1958 it was incorporated into the United Arab Republic.

"Our policy is to show the name of the place of birth in a passport as it is commonly known today and provided, of course, it reflects properly the sovereignty recognized by our Government. We regret we cannot show Egypt as the place of birth on your passport." **

Poland: (Germany)

"The Passport Office shows the place of birth of Germans born in those areas as follows:

For persons born in the Oder Neisse Territory –

Oder Neisse area – at present under Polish administration.[1]

For persons born in the part of former East Prussia at present under Polish administration –

[1]East Prussia – at present under Polish Administration.'" **

The Precedent File contains a copy of a joint memorandum, dated April 4, 1961, from the Chief of the Domestic Division and the Chief of the Administrative Division to the Director. This memorandum, entitled "Determination of places of birth for naturalized citizens" is quoted in its entirety, because of its pertinency:

"A very careful review of designation of birth was made several years ago including a thorough updating of the Guide. The results were set forth in Policy directive P-53 dated Sept. 28, 1959. It is believed that the policy is working reasonably well, since there have not been many complaints.

There are many diverse factors that must be taken into consideration in formulating one overall rule for writing birthplace and it is

impossible to have any single rule that will fit all situations and satisfy all persons.

One phase of the problem is to consider that there are two areas that create difficulties. One is where a large country is split up and several small ones created, e.g. Austria – Hungary, Germany. The other where a change in name of essentially identical territory is involved, e.g. Russia to USSR or Palestine to Israel.

The problem created by establishment of new countries has been resolved by writing country of present sovereignty and this is established policy. It is complicated occasionally by the question of the disputed territories in the Oder-Neisse area and also by diehard nationalists who cannot bring themselves to an acceptance of the historical realities involved by the transfer of territory belonging to their motherland. These complaints must be met on a case by case basis and a determination made whether to make an exception.

The other problem created by a change in name is the one raised by Mr. Ylitalo. It deals primarily with Russia, Palestine, Persia and Holland. The names of these countries have been changed to U.S.S.R., Israel, Iran and Netherlands. Only the first two are now active problems.

Originally Russia was always written. Then U.S.S.R. was used to designate persons born after 1917 and Russia for those born before 1917.

This unusual exception was made because of the protests of the White Russians to use of Soviet terminology. In order to be consistent with other Country designations it was decided in Sept., 1959 to use U.S.S.R. in all cases. This would bring it into line with this general rule.

Again, however, complaints were made by White Russians and so on March 25, 1960 PT/D adopted the policy of writing Russia or U.S.S.R. depending upon the terminology used by the applicant. No objections have been raised by any applicants to this policy. This procedure was not included in the FAM when this volume was subsequently written and so Mr. Ylitalo was not aware of it.

The geography of the world and the outlook of citizens and acceptance of designation by Foreign Countries changes periodically and problems such as those encountered here, properly should be reviewed at intervals to determine whether the solutions once considered valid still have application today. The statement in our letter that a review was being made of our policy on transcribing birthplace referred only to the policy concerning the writing of Russia vs. U.S.S.R. and only generally to an overall look at the whole policy of country names. I believe we have a policy that is widely disseminated, is working quite well and needs revision only in a few areas such as Central Europe. I am recommending that the procedure now followed in PT/D on writing Russia or U.S.S.R. by included in FAM and at the same time our

present policy for writing Germany or Poland as given by the applicant be used for persons born in the now dispute territory of the Oder-Neisse area. We might include also an instruction on Israel. If a Christian or Mohammedan born in the Holy Land insists on birthplace being shown as Palestine (usually because of doing business in UAR) instead of Israel, we usually accede. Otherwise he may not be able to obtain a visa for travel to UAR.

We are constantly reviewing the policy as complaints are received. Since the interests of many writers are diametrically opposed, it is impossible to accede to the wishes of all. Considering all factors it is my conclusion that no overall revision should be made at this time but only a limited decision on whether to include present policy on Russia, Israel and Oder-Neisse in the FAM."

The Office is presently operating under SOPINST 2500.5A of August 3, 1962, copy of which is attached. Amendments are being considered with regard to United Arab Republic (Syria is listed as a separate country in the Guide accompanying 2500.5A) and with regard to the West Indies (with especial regard to Jamaica, which is now independent).

The subject of place of birth in the passport is covered in 8 FAM 249.24. This section however, has been revised and updated in the Passport Office (CP-12) but these revisions have not cleared SCA (as of April 29, 1963).

Place of Birth Information in Passports of Foreign States Under Present Practices

An examination of the current or recent passports of some dozen foreign states was made to note their practices with regard to this question. All but two – Japan and Bolivia – inserted place of birth information in one or more classes of passports of their respective countries. While this sampling is meager, it indicates that perhaps the majority of foreign states do include place of birth information in their passports.

Definition of "passport" in the Immigration and Nationality Act

In conclusion, consideration should be given to the definition of "passport" as set out in the Immigration and Nationality Act. This definition relates to United States passports when Section 215 of the Act is in effect, as it is at the present time.

The definition is as follows:

> "Sec. 101.(a) As used in this Act –
>
> (30) The term "passport means any travel document issued by competent authority showing the bearer's origin, identity and nationality if any, which is valid for the entry of the bearer into a foreign country."

This definition controls the passports of aliens coming to the United States, and of citizens leaving

and entering the United States under the provisions of Section 215 of the Immigration and Nationality Act. Thus it appears that at present the "bearer's origin" is required by statute to be shown in a United States passport.

Library Subject File and Office File Identifications

Executive Orders

This memorandum, pp. 1-3
SOURCE: Library Subject File: 142.1(2)

Bigelow Memorandum

Memorandum prepared by Donald F. Bigelow, FSO, in 1929, entitled "Outlined of Steps Taken to Simplify Passport Formalities – Comparison of Practice of This and Other Governments."
SOURCE: Library Subject File 130.74

Quotations from Letters to Applicants

This memorandum, pp. 4, 5, 8 & 9.
SOURCE: Flimsy File in Mr. Mang's Office entitled "Countries."

Joint Memorandum

This memorandum, pp. 10-11
SOURCE: Library Subject File: 142.71

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PAGE 01 STATE 074003
ORIGIN OCS-06

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MMO-01	AF-10	ARA-15	EA-12
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E.O. 12065 N/A

TAGS: CSC; CPAS

SUBJECT: PLACE OF BIRTH IN PASSPORTS

1. THE DEPARTMENT HAS CHANGED ITS POLICY REGARDING THE PLACE OF BIRTH ENTRY IN U.S. PASSPORTS. SOME PERSONS HAVE OBJECTED TO SHOWING THE FOREIGN COUNTRY OF BIRTH.

2. EFFECTIVE IMMEDIATELY, U.S. CITIZENS BORN ABROAD WHO OBJECT TO SHOWING

THE FOREIGN COUNTRY AS PLACE OF BIRTH MAY HAVE ONLY THE CITY OR TOWN OF BIRTH WRITTEN IN THEIR PASSPORTS. THE CITY OR TOWN WILL HAVE EITHER THE NAME THEY HAD AT THE TIME OF THE APPLICANT'S BIRTH OR THE CURRENT NAME. PERSONS WHO DO NOT OBJECT TO SHOWING THE FOREIGN COUNTRY WILL CONTINUE TO HAVE THAT COUNTRY SHOWN AS PLACE OF BIRTH IN THEIR PASSPORTS.

3. APPLICANTS WHO OPT FOR HAVING THE CITY OF BIRTH WRITTEN IN THE PASSPORT SHOULD BE TOLD THEY MAY ENCOUNTER DIFFICULTY TRAVELING TO, OR OBTAINING VISAS FROM, SOME COUNTRIES. IF A VISA IS DENIED IN ANY OF THESE CASES AND THE PERSON WANTS A NEW U.S. PASSPORT SHOWING COUNTRY OF BIRTH THE USUAL PASSPORT FEES MUST BE COLLECTED. APPLICANTS SHOULD ALSO BE TOLD THAT ALTHOUGH A VISA MAY NOT BE REQUIRED IN ADVANCE TO ENTER A PARTICULAR COUNTRY ENTRY MAY BE DENIED BY BORDER OFFICIALS, BASED ON THE CITY OR TOWN ENTRY. AGAIN THE TRAVELER MUST PAY THE REGULAR FEES FOR ANY REPLACEMENT PASSPORT THAT IS ISSUED.

4. 8 FAM 249.24 (PROCEDURES) WILL BE REVISED AS SOON AS POSSIBLE TO REFLECT THE CONTENTS OF THIS TELEGRAM. ANY OTHER INFORMATION IN 8 FAM INCONSISTENT WITH THIS TELEGRAM SHOULD BE DISREGARDED.

5. FOREIGN GOVERNMENTS ARE BEING INFORMED OF THIS CHANGE BY DIPLOMATIC NOTE TO THEIR EMBASSIES IN WASHINGTON. CHRISTOPHER

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Passport Services
INSTRUCTION

Date: May 10, 1987

TO: All Employees

FROM: Deputy Assistant Secretary for Passport Services

SUBJ: Birthplace to be Written in Passports

1. Purpose. This Instruction provides policy for writing an applicant's place of birth in passports. It updates the Birthplace Guide list attachment.

2. Background. For persons who were born in the United States, we continue to write the state name in full followed by "U.S.A.

For persons born outside the United States, the country of birth as it is known at the time of passport issuance is generally written. However, certain exceptions to this policy, as indicated in this Instruction, may be made when there are objections to the country listing as established by the Department of State.

In machine readable passport issuing systems, agencies use the appropriate two or three letter birthplace code except as provided in 4d.(10). They are key entered into the system at the Data Entry Station. The computer will translate codes into proper birthplaces and print out at the Book Print station.

*An asterisk indicates a change in the Instruction or Birthplace Guide. The symbol "_/ " next to a Place of Birth refers the reader to the corresponding number under Procedures, subparagraph d. Special Cases.

3. Responsibilities. Examiners are responsible for determining that the proper birthplace or MRP code is written in accordance with this Instruction: Unless otherwise stated in the Instruction request, exceptions to writing birthplaces as listed are to be requested from the Regional Director or Branch Chief. Refer routine requests for transcription of a place of birth not listed in the Guide to the Agency Adjudication Chief or Branch Chief.

4. Procedures. Write the state, country or area of birth, as appropriate, in the passport as shown in the attached Birthplace Guide; the approved entries and MRP Codes are listed in capital letters. In certain special cases, as indicated in paragraph 4d(9), the city or town of birth may be written in the passport.

a. Birth in the fifty states and the District of Columbia. The unabbreviated name of the state, followed by the initials "U.S.A." will be written in the passport as shown in Section I of the Guide. The entry "District of Columbia, U.S.A." will be written instead of Washington D.C. The passport application should show the exact locality of birth, i.e. the city or country and the state. MRP agencies should enter appropriate two-letter code shown in Section I of the Guide.

b. Birth in U.S. Territories and Outlying Areas. The name of the territory or possession, as listed in Section II of the Guide, will be written in the passport as the place of birth. The designation "U.S.A." is written only after Guam, Puerto Rico and the Northern Mariana Islands. MRP Agencies shall enter the appropriate three-letter code shown in Section II of Guide.

c. Birth Outside the United States. As a general rule, the country of birth as it is currently known will be written in the passport using the spelling shown in Section II of the guide. (Note that certain places of birth may be written differently owing to a limitation of 24 characters in the birthplace field in these passports.)

d. Special Cases.

(1) Country of Birth Agrees with Former Nationality. When the country of birth shown on the application agrees with the former nationality shown on the naturalization certificate (or country of birth shown on other citizenship documents), and is an acceptable place of birth listed in the Guide, then the country of birth as shown on the application may be written in the passport. In the above situation, the Examiner need not question whether the country of birth listed on the application and citizenship documents has present sovereignty over the actual place of birth.

(2) Country of Birth Differs from Former Nationality. When the country of birth shown on the application differs from the former nationality, the

country of birth shown on the application may normally be written in the passport if it is acceptable place of birth listed in the Guide. However, if there is a question as to what country has present sovereignty over the actual area of birth, the Examiner should verify the country having present sovereignty and change the application if necessary. A frequent example requiring verification occurs when an applicant was born in part of a country (e.g. Germany) which was later legally annexed by another country (e.g. Poland). The application would show birthplaces as Germany; the naturalization certificate would show nationality as Polish.

(3) Incorporation of Independent Countries. Any independent country whose incorporation into another nation is not recognized by the United States, e.g. Estonia, Latvia and Lithuania, shall continue to be written in the passport as the country of birth, if shown on the application.

(4) Disputed Territory. When the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport, e.g. Danzig (or Gdansk), East Prussia or Bessarabia is shown on the application and if approved for use by the Birthplace Guide.

(5) U.S.S.R., Russia, Byelorussia, Ukraine. When persons are born in the Union of Soviet Socialist Republics, Russia, Byelorussia or the Ukraine, regardless of the date of birth, the birthplace should be written as either U.S.S.R.,

Russia, Byelorussia or Ukraine, whichever is stated on the application.

(6) Birth at Sea or in the Air. When birth or citizenship documents indicate that birth occurred in air or at sea, and no country is considered as having sovereignty over the area of birth; "At Sea" or "In the Air" may be written as the birthplace in the passport.

(7) Palestine. Applicants born in the area formally known as Palestine, who give their birthplace as Palestine in their applications, have occasionally objected to showing Israel or Jerusalem as their birthplace in the passport. In such instances, our general policy of showing the birthplace as the country having present sovereignty is to be explained to the applicant. Exceptions to showing Palestine as the birthplace may be made by the Regional Director or Branch Chief in individual cases upon consideration of the circumstances, provided the applicant was born before 1948. If the applicant was born in 1948 or any succeeding year, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty.

(8) Israeli Occupied Areas. As result of the June 1967 Arab-Israeli War, Israel currently occupies and administers the Golan Heights, the West Bank and Gaza Strip. It is U.S. policy that the Golan Heights is Syrian territory and that the West Bank and Gaza Strip are territories whose final status is to be determined by the course of negotiations. The country name that should appear

on passports whose bearers were born in the Golan Heights is Syria. The country name for people born in the West Bank is West Bank; and for people born in the Gaza Strip is the country name Gaza Strip. People born in the West Bank or Gaza Strip before 1948 should list Palestine as their country name.

Area Name	Country Name
Golan Heights	SYRIA
West Bank	WEST BANK
Gaza Strip	GAZA STRIP is the preferred entry. (This area was last part of a sovereign entity when part of Palestine. Therefore, PALESTINE will be the alternate acceptable entry, provided the applicant was born before 1948.)

(9) Birth in the Former Canal Zone. For persons born on or after October 1, 1979, the place of birth in the passport must be listed as Panama. For persons born prior to October 1, 1979, Panama should be listed as the place of birth; however, if the applicant objects, Canal Zone may be listed as the place of birth. When the applicant objects to the use of either Panama or Canal Zone as the place of birth designation in the passport, the city or town of birth may be listed.

(10) City of Birth Listing. U.S. citizens born abroad are permitted the option of listing the city or

town of their birth rather than the country when there are objections to the country listing as set forth in the Birthplace Guide. The name of the city or town of birth designated will be the name at the date of the applicant's birth or the current name. Requests for verification of the proper city name to be listed are to be referred to the Agency Adjudication Chief or Branch Chief. In MRP Agencies write out the city or town in the POB field on the CRT (to a maximum of 24 characters) as there are no standard MRP codes for city birthplaces.

Applicants who opt for the city or town designation will be given Form M-397, advising them of difficulties which they might encounter in traveling to, or obtaining visas for entry into certain foreign countries. "M-397" will be noted on the front of the application. If an applicant must subsequently be issued a replacement passport listing the country of birth designation, the applicant will incur the expense of the replacement passport.

Current Class: UNCLASSIFIED
Current Handling: n/a
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E.O. 12958: N/A
TAGS: PREL, KPAL, IS
SUBJECT: PUBLICIZING THAT U.S. POLICY
TOWARD JERUSALEM HAS NOT CHANGED

REF: A) STATE 191268 B) STATE 193340

1. WE UNDERSTAND THAT DESPITE OUR EFFORTS AT CLARIFICATION (REFTELS) MEDIA AND PUBLIC IN MANY MIDDLE EASTERN AND ISLAMIC STATES CONTINUE TO BELIEVE THAT THE STATE AUTHORIZATION BILL SIGNALS A CHANGE IN U.S. POLICY TOWARDS JERUSALEM. DRAWING ON THE POINTS FOUND BELOW POSTS SHOULD USE ALL POSSIBLE MEANS TO SPREAD THE MESSAGE THAT OUR POLICY HAS NOT CHANGED AND THAT WE WILL NOT IMPLEMENT THE THREE JERUSALEM RELATED PROVISIONS IN THE BILL. COMS, PD OFFICERS, AND OTHER APPROPRIATE EMBASSY STAFF ARE ENCOURAGED TO EXERCISE MAXIMUM CREATIVITY AND ENERGY TO TARGET THE MEDIA IN PARTICULAR THROUGH "ON THE RECORD" STATEMENTS.

2. BEGIN SUGGESTED POINTS:
--UNITED STATES POLICY TOWARDS JERUSALEM HAS NOT CHANGED IN ANY WAY. WE CONTINUE TO BELIEVE THAT JERUSALEM IS A PERMANENT STATUS ISSUE THAT MUST BE RESOLVED THROUGH NEGOTIATIONS BETWEEN THE PARTIES. WE OPPOSE UNILATERAL ACTIONS BY EITHER PARTY OR

BY MEMBERS OF THE INTERNATIONAL COMMUNITY THAT COULD HAVE THE EFFECT OF PREJUDICING THOSE NEGOTIATIONS.

--WE FULLY UNDERSTAND JERUSALEM'S IMPORTANCE TO BOTH SIDES AND TO-MANY OTHERS AROUND THE WORLD. WE ARE CONCERNED THAT RECENT LEGISLATION MAY BE CONSTRUED AS SIGNALING A CHANGE IN OUR POLICY TOWARDS JERUSALEM. THIS IS NOT TRUE.

--WHEN THE PRESIDENT SIGNED THE STATE AUTHORIZATION BILL HIS SIGNING STATEMENT EXPLICITLY STATED THAT OUR POLICY TOWARDS JERUSALEM HAS NOT CHANGED AND MADE CLEAR THE ADMINISTRATION WILL NOT CONSIDER THE PROVISIONS CONCERNING JERUSALEM TO BE MANDATORY. WE DO NOT INTEND TO IMPLEMENT THEM.

--THUS, THE CONSULATE IN JERUSALEM CONTINUES TO BE AN INDEPENDENT POST REPORTING DIRECTLY TO THE STATE DEPARTMENT'S BUREAU OF NEAR EAST AFFAIRS. OUR POLICIES REGARDING LISTING JERUSALEM AS A PLACE OF BIRTH IN CONSULAR DOCUMENTS AND ITS CHARACTERIZATION IN DEPARTMENT PUBLICATIONS

ALSO HAS NOT CHANGED. CA WILL SEND INSTRUCTIONS TO THIS EFFECT TO THE FIELD.
POWELL

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NCS FOR LEVERETT
NEA FOR FRONT OFFICE AND NEA/IPA

E.O. 12958: DECL: 01/01/2012
TAGS: KPAL, KWBG, PGOV, PREL, IS
SUBJECT: PALESTINIANS CONDEMN JERUSALEM PROVISIONS OF STATE AUTHORIZATION BILL

REF: STATE 191268

CLASSIFIED BY: ACTING PRINCIPAL OFFICER JEFFREY FELTMAN, REASONS 1.5 (B) AND (D).

1.–SUMMARY: PALESTINIANS FROM ACROSS THE POLITICAL SPECTRUM STRONGLY CONDEMNED THE JERUSALEM PROVISIONS OF THE STATE AUTHORIZATION BILL, INTERPRETING THOSE PROVISIONS AS A

REVERSAL OF LONGSTANDING U.S. POLICY THAT JERU-SALEM'S STATUS SHOULD BE DETERMINED BY ISRAEL AND THE PALESTINIANS IN FINAL STATUS TALKS. DESPITE OUR BEST EFFORTS TO GET THE WORD OUT THAT U.S. POLICY ON JERUSALEM HAS NOT CHANGED, THE RESERVATIONS CONTAINED IN THE PRES-IDENT'S SIGNING STATEMENT HAVE BEEN ALL BUT IGNORED, AS PALESTINIANS FOCUS ON WHAT THEY CONSIDER THE NEGATIVE PRECEDENT AND SYMBOLISM OF AN AM-ERICAN LAW DECLARING THAT ISRAEL'S CAPITAL IS JERUSALEM. END SUMMARY.

2. (U) FOLLOWING IS A SAMPLE OF THE LOCAL REACTIONS:

--THE PLO EXECUTIVE COMMITTEE, THE FATEH CENTRAL COMMITTEE, AND THE (LAME DUCK) PA CABINET ISSUED STATE-MENTS 10/1 HARSHLY CRITICIZING THE LAW AND ASSERTING THAT IT "UNDERMINES THE ROLE OF THE U.S. AS A SPONSOR OF THE PEACE PROCESS."

--THE PLC SPEAKER'S OFFICE ISSUED A STATEMENT SAYING THAT THE LAW WAS "AN UNPRECEDENTED UNDERVALUING OF PAL-ESTINIAN, ARAB AND ISLAMIC RIGHTS IN

JERUSALEM" THAT "RAISES QUESTIONS ABOUT THE REAL POSITION OF THE U.S. ADMINISTRATION VIS-À-VIS JERUSALEM."

--THE FIDA PARTY (A SMALL, LEFTIST-SECULAR FACTION IN THE PLO) SAID THE LAW VIOLATED UN RESOLUTIONS AND WARNED THE ADMINISTRATION AGAINST IMPLEMENTING IT.

--HAMAS CHARACTERIZED THE LAW AS A "DIRECT AGGRESSION AGAINST THE PALESTINIAN PEOPLE" AND "A LEGALIZATION OF THE OCCUPATION." HAMAS SAID THE PRESIDENT'S RESERVATIONS (IN THE SIGNING STATEMENT) WERE NOT IMPORTANT.

--PIJ SAID THE LAW WAS ANOTHER EXAMPLE OF "THE U.S. DOUBLE STANDARD" IN DEMANDING THAT ARAB STATES COMPLY WITH UN RESOLUTIONS WHILE IGNORNING ISRAELI DEFIANCE OF RESOLUTIONS THAT APPLY TO ISRAEL.

--THE DFLP CONDEMNED THE LAW AS "STUPID" AND CALLED THE PRESIDENT'S RESERVATION "COSMETIC."

--NUMEROUS POLITICAL PERSONALITIES, INCLUDING PLO JERUSALEM AFFAIRS

COMMISSIONER SARI NUSSEIBEH, MUNICIPAL AFFAIRS MINISTER SAEB EREKAT AND INTERNATIONAL COOPERATION MINISTER NABIL SHA'ATH, ISSUED STATEMENTS CONDEMING THE LAW.

--AL-JAZEERA TV INTERVIEWED "NORMAL" PALESTINIANS IN THE STREET, WHO SAID THAT THE LAW WAS FURTHER PROOF OF THE U.S. BIAS TOWARD ISRAEL AND AGAINST ARABS. MANY INTERVIEWEES VOWED NOT TO "GIVE UP" JERUSALEM.

3. IN ADDITION, DOEZENS OF PALESTINIAN MINISTERS AND OTHER POLITICAL FIGURES HAVE CALLED THE CONSULATE AND A/PO TO COMPLAIN. IN SEPARATE MEETINGS WITH A/PO ON 10/2 [(D-6)

]ALL OPENED THE DISCUSSIONS WITH A STRONG DENUNCIATION OF THE LAW [ ] HAD A SOPHISTICATED UNDERSTANDING OF THE LEGISLATIVE PROCESS IN THE U.S. AND TEMPERED [ ] CONDEMNATION [D-6] WITH EXPRESSIONS OF APPRECIATION TO THE ADMINISTRATION FOR ITS STRONG STANCE AGAINST IMPLEMENTATION OF THE LAW. [

--

D-1] A/PO EXPLAINED TO ALL (AS WELL AS TO ALL CALLERS) THAT U.S. POLICY TOWARD JERUSALEM HAS NOT CHANGED.

4. COMMENT: THESE STRONG, EMOTIONAL REACTIONS REFLECT TO A LARGE DEGREE THE SIMPLISTIC AND SENSATIONALIST WAY THAT REGIONAL AND LOCAL ARAB MEDIA HAVE PORTRAYED THE LAW. WHILE HEADLINES BLARE THAT THE U.S. NOW RECOGNIZES JERUSALEM AS ISRAEL'S CAPITAL, REFERENCES TO THE ADMINISTATION'S ASSURANCES THAT U.S. POLICY TOWARD JERUSALEM HAS NOT CHANGED ARE BURIED IN THE TEXT, IF MENTIONED AT ALL. [D-1 FELTMAN]

UNCLASSIFIED

PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 13-628

Supreme Court, U.S.
FILED
JUL 15 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z.
and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

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No. 13-628

IN THE
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, by his parents and guardians, ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,
Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a – 63a) is reported at 725 F.3d 197 (D.C. Cir. 2013). Earlier opinions of the Court of Appeals are reported at 571 F.3d 1227 (D.C. Cir. 2009), *rehearing en banc denied*, 610 F.3d 84 (D.C. Cir. 2010), *rev'd*, 132 S. Ct. 1421 (2011), and 444 F.3d 614 (D.C. Cir. 2006). The District Court's two opinions are reported at 511 F.

Supp. 2d 97 (D.D.C. 2007), and electronically at 2004 WL 5835212 (D.D.C. Sept. 7, 2004).

JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its opinion on July 23, 2013. On October 8, 2013, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 20, 2013 (Pet. App. B, p. 64a). The petition for a writ of certiorari was filed on November 20, 2013, and was granted on April 21, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 214(d) of Public Law No. 107-228 provides as follows:

> **SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL**
>
> * * *
>
> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

STATEMENT OF FACTS

1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in Western Jerusalem on October 17, 2002. His parents, Ari Z. Zivotofsky and Naomi Siegman Zivotofsky, were born in the United States in September 1963 and June 1965, respectively. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth, having been born to parents who were both United States citizens at the time of his birth.

Petitioner's mother visited the United States Embassy in Tel Aviv on December 24, 2002. She applied for a passport and Consular Report of Birth Abroad ("CRBA") for her newborn son and requested that the place of birth on both documents be designated as "Israel."[1] Her requests were denied. Petitioner's passport and CRBA list only "Jerusalem" as his place of birth. JA 22-23. They do not include *any* country of birth.

2. State Department Policy

Rules regarding "Passport Preparation" appear in the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1380-1383. The relevant sections

---

[1] Her initial request was that the passport and CRBA read "Jerusalem, Israel." During the litigation, the request was modified to read only "Israel." The Court of Appeals accepted this modification in its first opinion. *Zivotofsky v. Secretary of State*, 444 F.3d 614, 616, n.1 (D.C. Cir. 2006).

of the Rules that were in effect in 2002 appear in the Joint Appendix ("JA") at pp. 109-149.

Section 1383.5-6 of the FAM relates specifically to Jerusalem. It reads as follows in both the 2002 and current versions (JA 115):

> **7 FAM 1383.5-6 Jerusalem**
> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (*see* subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

A "birthplace transcription guide" appears as "Part II" of 7 FAM 1383 (JA 116-149). With regard to "JERUSALEM" the "guide" directs (JA 130):

> [Do not write Israel or Jordan. *See* sections 7 FAM 1383.5-5, 7 FAM 1383.5-6.]

Following "ISRAEL," the "guide" states (JA 129):

> [Does not include Jerusalem or areas under military occupation. *See* section 7 FAM 1383.5-5.]

It is undisputed that the State Department has followed the policy, applied in petitioner's case, of rejecting applicants' requests to designate "Israel" as the birthplace of United States citizens born in Jerusalem, even within Jerusalem's pre-1967 "municipal limits."[2]

3. The Statute

Section 214 of the Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002), relates, in the first three of its four subsections, to the location of the United States Embassy in Israel. Subsection (a)

---

[2] The FAM notes that applicants "who were born in the area formerly known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place of birth.' 7 FAM 1383.5-4, JA 111-112.

After telling consular officers to "explain" to the applicant "the general policy of showing the birthplace as the country having present sovereignty," the FAM authorizes consular officers to "make exceptions to show Palestine as the birthplace in individual cases upon consideration of all the circumstances" for applicants born before 1948. Applicants with similar objections who were born after 1948 need not show "Israel" as their birthplace because Section 1383.5-4 declares that "the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty." JA 112.

"urges" the President "to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem" pursuant to the Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398.

Subsection (d) is the only provision of Section 214 that is at issue in this case. It concerns whether a United States citizen's official documentation may indicate, on his request, that he is born in "Israel" if he is born anywhere in Jerusalem (including Western Jerusalem). The law directs the Secretary of State "upon the request of the citizen or the citizen's legal guardian, [to] record the place of birth as Israel."

When he signed the Act on September 30, 2002, President George W. Bush made the following statement regarding Section 214 in its entirety (without distinguishing between subsection (d) and the first three subsections), *Statement on Signing Foreign Relations Authorization Act,* Public Papers of the Presidents of the United States: George W. Bush (2002, Book II) 1697, 1698 (September 30, 2002):

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with

> the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

4. The District Court Dismisses the Complaint

Petitioner's parents filed a complaint in the United States District Court for the District of Columbia on his behalf seeking an injunction, mandamus, and declaratory relief on September 16, 2003. JA 18-21. The government moved to dismiss the complaint, and petitioner cross-moved for summary judgment. JA 1 (Doc. Nos. 6 and 14).

On September 7, 2004, the district court issued a Memorandum Opinion granting the government's motion to dismiss on the grounds that (1) petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented nonjusticiable political questions because it challenged the Executive Branch's exclusive authority to recognize foreign sovereigns. JA 28.

5. The First Dismissal Is Reversed

The court of appeals reversed. *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006). It held that petitioner did have standing to maintain the action and remanded the case for discovery and the development of "a more complete record" on

which to decide the "political question" issue. 444 F.3d at 620.

6. Facts Established in Discovery

(a) The purpose of the "place-of-birth" designation

The government admitted, in response to petitioner's Requests for Admissions, that "United States citizens traveling in foreign countries are routinely identified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth" (JA 41), and that "identification is the principal reason" that U.S. passports require "place of birth" (JA 42).[3]

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[3] The government responded to petitioner's Interrogatories Nos. 15 and 16 as follows (JA 69-70):

> United States citizens encountering emergencies in foreign countries are identified in cables sent to U.S. posts abroad by the Directorate for Overseas Citizens Services by their name, date, and place of birth.
>
> * * *
>
> The "place of birth" information contained in a passport of a U.S. citizen is included for identification purposes, among other reasons, in messages sent to and from U.S. embassies, consulates, and other posts.
>
> * * *
>
> The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designed by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the

(b) The number of U.S. passports affected

In response to Interrogatory No. 3, the government stated that it had issued 99,177 passports in a ten-year period that listed "Israel" as the holder's place of birth and 52,569 passports that listed "Jerusalem" as the holder's place of birth. JA 51.

(c) The history of the "place-of-birth" designation

An internal Passport Office Memorandum dated May 20, 1963, stated (JA 200; emphasis added):

> The passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily *as a part of the identification of the bearer*. A search of the precedent files in the Passport Office Library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances.

Department of State American Citizens Services (ACS Plus) electronic case filing system.

Catherine Mary Barry, the Deputy Assistant Secretary of State for Overseas Citizens Services, testified as the State Department's designated representative in a Rule 30(b)(6) deposition. Her testimony was that place-of-birth is listed in a passport as "an element of identification." JA 78-79.

(d) Accommodation to individual requests

In March 1979 the Department announced that it had "changed its policy regarding the place of birth entry in U.S. passports" because "some persons have objected to showing the foreign country of birth." On this account, the Department directed that "U.S. citizens born abroad who object to showing the foreign country as place of birth may have only the city or town of birth written in their passports." JA 216-217.

Instructions issued by the Office of Passport Services in May 1987 noted that "[f]or persons born outside the United States, the country of birth as it is known at the time of passport issuance is generally written. However, certain exceptions to this policy, as indicated in this Instruction, may be made *when there are objections to the country listing as established by the Department of State.*" JA 219 (emphasis added). Authorizations to vary from the prescribed designation "if the applicant objects" are specified for "Palestine" (JA 223) and for the "former Canal Zone" (JA 224). Substitution of the city of birth was also permitted by the 1987 Instructions "when there are objections to the country listing as set forth in the Birthplace Guide." JA 225.

With respect to "Palestine," the 1987 Instructions stated that passport applicants "have occasionally objected to showing Israel or Jerusalem as their birthplace in the passport." Consular officers were instructed to "explain" the "general policy of showing the birthplace as the country having present sovereignty." If the applicant persisted in his or her

objection, an applicant born before 1948 could be shown as born in "Palestine" and someone born in 1948 or thereafter may be listed by the city or town of birth "if the applicant objects to showing the country having present sovereignty." JA 223. [4]

(e) Alleged adverse foreign-policy consequences

The State Department cited protests to the designation of a birthplace on a United States passport only when foreign governments objected to how they were identified. The Communist government in East Germany asked to be described in United States passports by its preferred title ("German Democratic Republic") rather than

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[4] Israel is the only country "having present sovereignty" to which this accommodation to the wishes of a person born in "Palestine" could apply. Hence the 1987 Instruction explicitly authorized persons born in Israel who did not want that country's name to be shown in their U.S. passports to avoid the "country having present sovereignty" even if, on the date of their birth, there was no question whatever that they were born within the State of Israel as internationally recognized.

Instructions issued in February 1993 authorized similar departures from the standard country listings of birthplaces whenever the applicant objected to the country listing. JA 173-176. Paras. 3D(7) ("Israel, Jerusalem, and Israeli-Occupied Areas"); 3D(8) ("Former Canal Zone"); 3D(9) ("City of Birth Listing"). The following new language was added to the Instruction (JA 173):

> Write ISRAEL as the place of birth in the passport if and only if the applicant was born in Israel itself (this does not include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the No Man's Lands between the West Bank and Israel).

"Germany." The United States refused, for foreign-policy reasons, to accord it that requested designation. JA 87-89. The State Department cited no objection to the place-of-birth identification of any individual passport-holder.

(f) The Taiwan precedent

On October 25, 1994, President Clinton signed Pub. L. No. 103-415 (108 Stat. 4299) ("The State Department Authorization Technical Corrections Act of 1994"), which amended Pub. L. No. 103-236 and directed the Secretary of State to "permit" U.S. citizens born in Taiwan to list "Taiwan" as the place of birth on their U.S. passports or Consular Reports of Birth Abroad. Before and after enactment of that law it was official United States foreign policy not to recognize Taiwan as a foreign state. Prior to enactment of the 1994 legislation, the instruction issued on February 25, 1993, by the Passport Office with regard to "Birthplaces to be Written in Passports" specified that American citizens born in Taiwan were to be identified as born in "CHINA." *See* attachment to JA 169-177.

The State Department had taken the position that recording "Taiwan" on a United States passport was inconsistent with "the United States' one-China policy" and "would have a negative effect on our relations with the PRC and Taiwan." JA 178-179. The government of the People's Republic of China had refused to issue visas on American passports showing "Taiwan" as the place of birth. JA 180-181, 183-186.

State Department Cable 299832, sent on November 5, 1994, to all foreign posts stated that the change made by Congress' new law was to be "effective immediately." It added: "The U.S. recognizes the Government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China." JA 154. Other contemporaneous documents expressed the Department of State's acceptance of the Congressional legislation. JA 156-158, 159-166. The consulate in Taipei reported in November 1995 that, after the law was passed in 1994, approximately one-third of U.S. passport applicants chose to specify Taiwan as their place of birth and "some AmCits have indicated they are pleased to be able to list Taiwan." JA 191.

7. The District Court Again Dismisses the Complaint

On October 3, 2006, following discovery, petitioner filed a motion for summary judgment. JA 4 (Doc. No. 39). The government renewed its motion to dismiss and moved alternatively for summary judgment. JA 6 (Doc. No. 44). The district court did not hold a hearing on the motions but issued an order on September 19, 2007, granting the government's motion to dismiss on the ground that the court lacked subject-matter jurisdiction because the complaint "raises a quintessential political question which is not justiciable by the courts." JA 8 (Doc. No. 52).

8. The Court of Appeals Affirms the Second Dismissal

A majority of the court of appeals panel affirmed the district court's dismissal on the ground that the complaint "raises a nonjusticiable political question" so that the district court and the court of appeals were "[l]acking authority to consider the case." 571 F.3d 1227 (D.C. Cir. 2009). Senior Circuit Judge Edwards concurred in the result but issued a 13-page opinion expressing his view that "the political question doctrine has no application in this case." 571 F.3d at 1234.

9. This Court Reverses and Remands

Petitioner filed a petition for a writ of certiorari raising only the "political question" issue. This Court granted certiorari with an order that directed the parties also to brief whether Section 214(d) "impermissibly infringes the President's power to recognize foreign sovereigns." *Zivotofsky v. Clinton,* 131 S. Ct. 2897 (2011). On March 26, 2012, this Court held that the constitutionality of Section 214(d) is not a "political question" but rather an issue that "the Judiciary is competent to resolve." The Court then noted that decision of the constitutional issue is not "simple." The majority opinion summarized the arguments made by both sides and remanded the case for "the lower courts to consider the merits in the first instance" in light of "the textual, structural, and historical evidence regarding the nature of the passport and recognition powers." *Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1430 (2012).

10. The Court of Appeals Affirms the Dismissal

Following briefing and oral argument, the court of appeals held that "the President ***exclusively*** holds the power to determine whether to recognize a foreign sovereign." 725 F.3d at 241 (emphasis added). The court found no "ratification-era evidence" giving the President exclusive authority to recognize foreign governments, but it concluded that "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." 725 F.3d at 207. The court of appeals acknowledged that the issue of the President's exclusive power has never been decided by this Court, but, describing itself as "an inferior court," it treated as "authoritative" *dicta* in opinions of this Court stating that the Executive had exclusive recognition authority. 725 F.3d at 212.

The court of appeals also held that Section 214(d) was not a valid exercise of Congress' power to regulate passports because "it runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem." 725 F.3d at 217. The court said it "was not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d)." 725 F.3d at 219. Circuit Judge Tatel issued a concurring opinion, noting that a court resolving the issues in this case is "in relatively uncharted waters with few fixed stars by which to navigate." 725 F.3d at 221.

INTRODUCTION

In our complex modern world, when the national interest often requires instantaneous response to dangers from abroad, Congress routinely assigns the lead in foreign relations to the President. Statutes give him great flexibility in dealing with international relations so that American interests in the world arena can be quickly and effectively implemented.

This is the unusual case in which, on a subject that calls for no emergency treatment, Congress decided that an Executive Branch policy implemented by Department of State bureaucrats for several decades was unjust and discriminatory. Congress overwhelmingly enacted a narrow law that gives approximately 50,000 American citizens born in Jerusalem the right to have their passports bear the same "place of birth" as American citizens born in Tel Aviv or Haifa. To these Americans, personal dignity and conscientious conviction calls on them to identify themselves as born in "Israel."

The government does not claim that the practical implementation of Section 214(d) will have any perceptible impact on American foreign policy. There are now approximately 100,000 U.S. passports that record their holders as having been born in Israel because they were born in cities like Tel Aviv and Haifa. If the 50,000 additional American citizens whose passports now read "Jerusalem" travel internationally with passports that say they are born in "Israel," America's foreign policy will not be impaired.

The government's only claim is that the publicity that accompanies the *change* in practice will be misperceived by Palestinians and the Arab world as an official change in America's position on the status of Jerusalem. The government cites public statements made when Congress enacted Section 214(d) as proof of this purported adverse foreign policy impact. This fear of unjustified and erroneous foreign misperception – apparently transitory when Congress enacted Section 214(d) – cannot be sufficient to nullify the considered judgment of Congress.

SUMMARY OF ARGUMENT

Section 214(d) is well within Congress' power to regulate the issuance and content of United States passports. Congress enacted a similar passport statute in 1994, when it permitted American citizens born in Taiwan to record Taiwan on their passports even though United States foreign policy recognized Taiwan as part of China. Congress has broad power over passports, and the State Department may not act without Congressional authority when it administers the issuance of passports. This Court has sustained Presidential authority over passports only when such authority is explicitly or implicitly authorized by Congress. If Congress fails to empower the President or, as in this case, disapproves the State Department's passport regulation, Congress prevails.

If this Court reaches the question whether the President has exclusive authority to recognize foreign sovereigns, the historical evidence overwhelmingly establishes that Presidential

recognition power is subject to laws enacted by Congress. Early judicial declarations assign the recognition power to the "legislative and executive departments." The earliest treatises on the United States Constitution recognize that although the President may initiate recognition, Congress has a "superior power" and it can "reverse" or "repudiate" the Executive decision.

Post-ratification history, beginning with the administrations of Presidents Adams and Jefferson and continuing to the McKinley administration, establish that the President does not have ***exclusive*** authority to recognize foreign governments. Indeed, Congress has, on occasion, enacted laws that recognize foreign governments

Opinions of this Court have contained *dicta* that the court of appeals felt obliged to follow in this case, but there are also *dicta* in other opinions that assign recognition authority to "the political branches" or to "the legislative and executive departments." Most significantly, none of the *dicta* in this Court's opinions relate to an instance such as this one, in which the President and the Congress disagree.

Under the "tripartite test" of Justice Jackson's concurrence in the *Steel Seizure Case*, frequently applied by this Court to determine Presidential authority, the President's power to deny the right conferred by Section 214(d) is at its "lowest ebb" because Congress disagrees with the President. Justification for such denial cannot pass the prescribed judicial "scrutiny" because the State Department cannot demonstrate a significant harm to foreign policy if it permits American citizens born

in Jerusalem to record their place of birth as "Israel."

ARGUMENT

I.

SECTION 214(d) IS APPROPRIATE PASSPORT LEGISLATION

A. The Title of the Statute and the Content of Its Other Subsections Do Not Impair the Constitutionality of Subsection (d).

This litigation concerns only subsection (d) of Section 214. It does not concern the enforcement of subsections (a), (b), or (c) – all of which pertain to the location of the United States Embassy in Israel. The constitutionality of subsection (d) must be determined separately from the constitutionality of other provisions of Section 214. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3161 (2010); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). On its face, subsection (d) addresses only how a place of birth is to be recorded on a passport or CRBA. It therefore falls squarely within Congress' power to regulate the issuance of passports.

To be sure, the title of Section 214 – "United States Policy With Respect to Jerusalem as the Capital of Israel" – sounds more in foreign policy than in passport regulation. Justices Alito and

Kagan questioned petitioner's counsel to this effect during the November 2011 oral argument. Transcript of Oral Argument, No. 10-699, November 7, 2011 (hereinafter "*Transcript*"), pp. 4, 17. But this Court's ruling in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), establishes that how Congress designates a duly enacted law does not control its constitutionality. The Court's majority opinion in *Sebelius* acknowledged that Congress had invoked its authority to regulate interstate commerce when it enacted the employer mandate provision of the Affordable Care Act, but, relying on the Court's "plain duty" to adopt a reading of a law "which will save the Act," the Court upheld the law as an exercise of Congress' taxing power. 132 S. Ct. at 2593, quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).[5]

Congress has dealt frequently and repeatedly with the subject of passports, and this Court has consistently looked to Congress' legislation in resolving passport issues even when they affect significant foreign-policy concerns. The Thirty-

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[5] The reference in this Court's majority opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013), to the title of the Defense of Marriage Act does not contradict our position. There is no separate subsection of DOMA that, like subsection (d) of Section 214, arguably exercises some independent Congressional authority. The dissenting Justices in *Windsor* did not, of course, join in the majority's reliance on the title of the Act. See 133 S. Ct. at 2696-2697 (Roberts, C.J.), 2708-2709 (Scalia, J.).

Fourth Congress enacted passport legislation in 1856 authorizing the Secretary of State "to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States." 11 Stat. 52, 60-61 (1856). Another Passport Act was passed in 1926 by the Sixty-Ninth Congress. 44 Stat. 887.

Passport laws enacted since 1926 include the following: 8 U.S.C. § 1365b (biometric entry and exit data system), 8 U.S.C. § 1504 (cancellation of U.S. passports and consular reports of birth), 8 U.S.C. § 1732 (machine-readable, tamper-resistant entry and exit documents), 18 U.S.C. § 1542 (false statement in application and use of passport), 18 U.S.C. § 1543 (forgery or false use of passport), 18 U.S.C. § 1544 (misuse of passport), 22 U.S.C. § 212a (restriction of passports for sex tourism), 22 U.S.C. § 2705 (documentation of citizenship), 22 U.S.C. § 2714 (denial of passports to certain convicted drug traffickers), 22 U.S.C. § 2721 (impermissible basis for denial of passports), and 42 U.S.C. § 652(k) (denial of passports for nonpayment of child support).

B. The Taiwan Precedent Establishes That Congress' Passport Legislation May Be Implemented While Maintaining Foreign-Policy Recognition.

There is no meaningful difference between the 1994 experience with Taiwan (*see* pp. 12-13, *supra*) and the 2002 Congressional enactment of Section

214(d). If Taiwan could be recorded on a passport because the passport-holder's personal wishes were enacted into law by Congress, the same should hold true after the 2002 enactment that prescribed recording "Israel" for any Jerusalem-born citizen who requests it. The Department of State can issue a formal policy declaration, as it did when Congress enacted the Taiwan legislation in 1994, that will make it clear that United States foreign policy regarding Jerusalem has not changed.

C. This Court Has Consistently Limited the President's Power Regarding Passports to the Authority Conferred by Congressional Statute.

In *Zemel v. Rusk*, 381 U.S. 1 (1965), this Court permitted the President to impose passport travel restrictions only after it concluded that he was "*statutorily authorized* to refuse to validate passports of United States citizens for travel to Cuba." 381 U.S. at 3 (emphasis added). The Court found such authority in the 1926 Passport Act, citing the President's explicit invocation of the Act in 1938 (381 U.S. at 10) and in Congress' subsequent implicit approval of Presidential travel restrictions (381 U.S. at 12-23). Justice Black's dissent noted Congress' "ample power to enact legislation regulating the issuance and use of passports for travel abroad." 381 U.S. at 20. Justice Goldberg's dissent explicitly rejected the government's contention that the President possesses an "inherent Executive power" to restrict the validity of a passport. 381 U.S. at 28-30. Justice Black also rejected this argument, noting that "regulation of passports, just like regulation of

steel companies, is a law-making – not an executive, law-enforcing – function." 381 U.S. at 20.

Whether American citizens should be permitted to travel to foreign countries where they may be in danger and where our foreign policy discourages travel by American citizens is an aspect of foreign relations in which the Executive ordinarily takes a leading role. Yet this Court was not prepared in *Zemel v. Rusk* to give the President a free hand in implementing this aspect of his foreign policy. The Court majority approved of such authority only after it determined that Congress had implicitly acquiesced in the President's exercise of that power.

Haig v. Agee, 453 U.S. 280 (1981), permitted the Secretary of State to revoke the passport of a citizen who was causing serious damage to American foreign policy only because the Court majority determined that "*the statute authorizes* the action of the Secretary pursuant to the policy announced by the challenged regulation." 453 U.S. at 289 (emphasis added). The Executive Branch's action was not upheld by the Court because of any foreign-policy authority inherently held by the President. It was upheld because the history that the Court recounted (453 U.S. at 292-306) established that "Congress has approved it." 453 U.S. at 306.

Section 214(d) regulates the content of a passport, and its constitutionality is challenged only because the State Department asserts that Congress may not "interfere" with the President's authority over foreign policy. Had Congress prohibited the imposition of travel restrictions or had it failed to

give implicit approval for such restrictions, the *Zemel* opinion indicates that this Court would not have permitted the President to impose such restrictions unilaterally on the ground that Congress may not "interfere" with his conduct of foreign policy. This Court's decision in *Haig v. Agee* also indicates that if Congress prohibited revocation of the passport of a citizen whose actions injured U.S. foreign policy, the President would not be permitted to revoke passports on the grounds that such revocation was needed for foreign-policy reasons even if he asserted that limiting his authority would "interfere" with the conduct of American foreign policy.

The mere assertion by the State Department of such "interference" is, in the government's view, sufficient to override Congress' considered judgment. As Justice Alito observed during the November 2011 oral argument of this case, the government's position gives the President "plenary authority, unreviewable authority, with respect to *anything that the President thinks* has a bearing on the question of recognition." *Transcript*, p. 32 (emphasis added). The President asserted foreign-policy concerns to justify the passport policies he followed in *Zemel v. Rusk* and in *Haig v. Agee*, but this Court did not deem the President's bare assertion of a foreign-policy concern adequate to sustain his claimed authority. The President similarly may not, by simply *asserting* a foreign-policy concern, nullify Congress' directive in passport legislation.

D. The State Department's Place-of-Birth Rules Do Not Implement Any Rational Executive Policy Governing Recognition of Foreign Sovereigns.

The government has challenged Section 214(d) as interfering with the President's authority to recognize "foreign sovereigns." But the FAM does not limit authorized places of birth to "sovereigns" that the United States has formally recognized.

As noted at pp. 12-13 and 21-22, *supra*, the FAM authorizes "TAIWAN" to be listed as a "place of birth" although the United States does not recognize Taiwan's sovereignty. JA 150-154. In addition, applicable provisions of the FAM authorize designating "GAZA STRIP" or "WEST BANK" as a place of birth. JA 112-113. Neither the Gaza Strip nor the West Bank is a sovereign that the United States has ever recognized. Nor has "Palestine" ever been recognized as a sovereign by the United States. Yet the Foreign Affairs Manual declares, "PALESTINE is the alternate acceptable entry provided the applicant was born before 1948." JA 113. The mere inclusion of these locations as approved "place-of-birth" designations is not tantamount to formal United States recognition of sovereignty. As such, the President's asserted "recognition" determinations with which Section 214(d) allegedly "impermissibly interfere[s]" apparently are unrelated to United States recognition of actual foreign sovereigns.

Moreover, the State Department's announced practice of accommodating the prejudices of individual passport-holders in designating their

place of birth vitiates any claim that a national foreign policy regarding recognition of foreign sovereigns is at stake. The foreign policy of the United States indisputably recognizes Haifa as located in Israel. Why, then, may a Palestinian born in Haifa who "vehemently protests" reference to Israel (*see* note 2, *supra*) eradicate "Israel" from his passport? Compliance with that personal prejudice conflicts with the President's recognition of foreign sovereigns much more directly than permitting a citizen born in Jerusalem to identify himself as born in "Israel."

E. Congress Frequently Legislates in Areas That Affect Foreign Policy.

Nor is the validity of Congress' exercise of a constitutional power impugned because, in the view of the State Department, it may "interfere" with the President's achievement of foreign-policy objectives. Congress frequently and routinely legislates, pursuant to explicit constitutional authority, in areas that affect foreign nations. One example is immigration law. This Court recently observed that "[i]mmigration policy can affect trade, investment, tourism, *and diplomatic relations for the entire Nation* " *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (emphasis added). The Executive Branch has never refused to enforce a particular provision of Congress' immigration legislation on the ground that it "interferes with the President's constitutional authority to conduct the Nation's foreign affairs" – which is the reason stated by President Bush for refusing to enforce Section 214(d).

Congress also affects foreign policy through legislation by exercising its constitutional power to regulate foreign commerce and its appropriations power. Trade legislation, such as economic sanctions, may achieve foreign-policy goals abroad. Because "dollars often are policy," the appropriation of funds for foreign and defense programs has a significant impact on the foreign policy of the United States. *See* James M. Lindsay, *Congress and the Politics of U.S. Foreign Policy* (Johns Hopkins University Press 1994), pp. 84-88. The President surely may not disregard such legislation on the ground that it "interferes" with his conduct of the Nation's foreign policy.

II.

SECTION 214(d) DOES NOT INFRINGE UPON ANY EXCLUSIVE PRESIDENTIAL POWER

There is no "Recognition Clause" in the United States Constitution. The President is merely assigned the ceremonial duty of receiving foreign ambassadors. There is no evidence that the Constitution was originally understood as vesting any "recognition power" – and certainly not ***exclusive*** "recognition power" – in the Executive branch. Nor does post-ratification history support such a claim. The court of appeals erred in declaring that there is "longstanding and consistent post-ratification practice" of Presidents exercising or claiming ***exclusive*** power over recognition, or of Congress acquiescing in such a claim by the Executive. 725 F.3d at 208. Indeed, Congress exercised the recognition power through legislation in the early

days of the Republic, and it sometimes reversed Executive recognition policies. Presidents such as James Monroe, Andrew Jackson, Zachary Taylor, and Abraham Lincoln believed that they were not free, if Congress disagreed, to accord official recognition to foreign governments. The leading early treatises on the United States Constitution and opinions by Justices of this Court expressed the same view.

A. The Original Understanding of the "Receive Ambassadors Clause" Did Not Give the President Exclusive Authority To Recognize Foreign Sovereigns.

Article II, Section 3 of the Constitution declares that the President "shall receive Ambassadors and other public Ministers." The late Professor Louis Henkin noted that unlike the authority to appoint ambassadors, which is included among "Presidential powers," the authority to receive foreign ambassadors "seems to be couched rather as a duty, an 'assignment.'" Louis Henkin, *Foreign Affairs and the United States Constitution* 37-38 (2d ed., Oxford Univ. Press 1996) (1972).

In *The Federalist No. 69*, Alexander Hamilton characterized this Presidential prerogative as "more a matter of dignity than of authority," and called it "a circumstance which will be without consequence in the administration of the government." He explained that the President was assigned this task so that it would not be necessary to convene a house of Congress "upon every arrival of a foreign minister,

though it were merely to take the place of a departed predecessor." [6]

From his thorough study of the original understanding of the Founding Fathers. Professor Robert Reinstein concluded that the "Receive Ambassadors Clause" was not intended to confer on the President the authority to recognize foreign sovereigns – and surely not the ***exclusive*** authority to do so. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 Univ. Rich. L. Rev. 801 (2011) (hereinafter "*Reinstein Original Understanding*"). He said, "[T]here is no originalist basis for the proposition that a plenary recognition power was vested in the President," and "[t]here is no recorded evidence that any of the participants in the drafting and ratifying of the Constitution – Federalists and Anti-Federalists alike – understood that any provision in the Constitution *vested* such a power in the presidency, and certainly not a power that is plenary in nature." *Reinstein Original Understanding* at 820, 862 (emphasis original).

The court of appeals accepted Professor Reinstein's appraisal of ratification-era evidence. It said, "[T]he Framers apparently were not concerned with how their young country recognized other

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[6]Hamilton modified his views in 1793. David Gray Adler, *The President's Recognition Power, in The Constitution And The Conduct Of American Foreign Policy* 133, 144-146 (Univ. of Kansas Press 1996). The *Federalist* discussion is, however, the best evidence of the original understanding of the draftsmen of the Constitution.

nations because the issue was not important to them at the time of ratification." 725 F.3d at 207.

Moreover, even if the Receive Ambassadors Clause created an implied "recognition power" in the President, it was not exclusive. Receiving ambassadors is only one means of recognizing a foreign government. Other methods require participation of the Senate (if done by treaty, *see Reinstein Original Understanding* at 820-838) or the appointment of diplomats to the foreign government (which also requires Senate approval). Congress has also exercised "recognition power" under its war and foreign-affairs authority. Each of these include implied non-exclusive recognition authority.

B. Chief Justice John Marshall's Opinion for the Full Supreme Court in 1818 and Later Decisions of This Court Have Described Shared "Recognition" Authority.

The State Department has, over the course of this litigation, repeatedly relied on language expressed by Chief Justice John Marshall when he was sitting by himself as a trial judge in a piracy case. In *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817), Chief Justice Marshall said that the court could not accord recognition to the government of Buenos Ayres because "our executive had never recognized the independence of Buenos Ayres."

This was not, however, a considered ruling by Chief Justice Marshall that *only* the President has recognition authority. The following year the full Supreme Court decided *United States v. Palmer*, 16

U.S. 610 (1818), another piracy prosecution. The Court's certified holding in *Palmer* stated (16 U.S. at 643 (emphasis added)):

> [W]hen civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government *as it is viewed by the legislative and executive departments of the government of the United States.*

Chief Justice Marshall observed in *Palmer* that the "delicate and difficult" issues affecting recognition of a foreign government are "rather political than legal in their character" and that they "belong more properly to those who can declare what the law shall be" than to the courts. 16 U.S. at 634. This referred, as he explicitly noted, to both "the legislative and executive departments" – *i.e.*, to Congress and the President.[7]

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[7] The *Palmer* formulation was re-affirmed by this Court in *Jones v. United States*, 137 U.S. 202, 212 (1890) (emphasis added):

> Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which *by the legislative and executive* departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.

C. The Constitutional-Law Treatises of Both William Rawle and Joseph Story Assigned the Recognition Power to both Congress and the President.

In 1825 and 1833 respectively, William Rawle and Joseph Story published their authoritative treatises on the Constitution of the United States. Chapter 20 of Rawle's "*A View of the Constitution of the United States of America,*" (Philip H. Nicklin 2d ed. 1829), p. 96, stated (emphasis added):

> The power of receiving foreign ambassadors, carries with it among other things, the right of judging in the case of a revolution in a foreign country, whether the new rulers ought to be recognised. *The legislature indeed possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until that sense is declared, the act of the executive is binding.* The judicial power can take no notice of a new government, till one or the other of those two departments has acted on it.

In *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), competing governments of Mexico sought recognition in United States courts. This Court said in *Oetjen* that "The conduct of foreign relations of our government is committed by the Constitution to the *executive and legislative* – 'the political' – departments of the government " 246 U.S. at 302 (emphasis added).

Joseph Story's "*Commentaries on the Constitution of the United States*" (Boston 1833), § 1560, declared (emphasis added):

> If such recognition is made, it is conclusive upon the nation, *unless indeed it can be reversed by an act of congress repudiating it.* If, on the other hand, such recognition has been refused by the executive, it is said, that *congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation, or party.*

Justice Story's 1838 opinion as Circuit Justice in *Williams v. Suffolk Ins. Co.,* 29 F. Cas. 1402, 1404 (D. Mass. 1838), states that "it belongs exclusively to the executive department of our government to recognize, from time to time, any new governments, which may arise in the political revolutions of the world." The remainder of Justice Story's opinion, however, clearly demonstrates that he was considering *only* whether "this court, in its judicial character" could differ with a recognition decision rendered by the President, not whether Congress had authority to participate in determining whether to grant recognition.

Justice McLean's opinion for this Court affirming Justice Story's ruling (*Williams v. Suffolk Ins. Co.*, 38 U.S. 415 (1839)) described the issue before the Court as whether the President's decision regarding jurisdiction over the Falkland Islands was "conclusive on the judicial department." 38 U.S. at 420. The opinion declared that the President's denial

of Buenos Ayres' jurisdiction over the Falkland Islands "must be taken and *acted upon by this Court* as thus asserted and maintained." *Id.* (emphasis added). The case did not concern disagreement between Congress and the President on a recognition issue

D. Post-Ratification History Does Not Support the Existence of an Exclusive Executive Recognition Power.

The court of appeals erroneously concluded that "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." 725 F.3d at 207. The court's historical survey was incomplete. It omitted instances in which Congress had exercised its recognition power, and the court's analysis of historical events was contextually inaccurate. The post-ratification history establishes that neither President nor Congress believed that the President's "recognition power" was beyond legislative control by Congress.

(1) Washington and Post-Revolutionary France

The court of appeals mistakenly accorded great weight to President Washington's unilateral acceptance of Edmond Genet, the minister sent by France's post-revolutionary government. Its opinion states that this constituted recognition of "a new government by implication." 725 F.3d at 208.

President Washington's multiple recognitions of French revolutionary governments and other

unilateral actions he took during the Neutrality Crisis were not, however, discretionary foreign-policy judgments. They were mandated by the Washington administration's well-documented fealty to the law of nations. *See* Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 375-79, 398-409 (2012) (hereinafter "*Reinstein Washington*"); *see also* Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 Am. J. Int'l L. 239 (1932); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010)

Scholars agree that the Washington administration adopted the doctrine of *de facto* recognition articulated by political philosopher Emmerich de Vattel — the principle that "every government had the duty to recognize and receive foreign ministers from any government that was in 'actual possession' of the instruments of national power." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 11 (2013) (hereinafter "*Reinstein Recognition Power*"); *see also Reinstein Washington* at 424; David Gray Adler, *The President's Recognition Power, in The Constitution and the Conduct of American Foreign Policy* 133, 138-49 (David Gray Adler & Larry N. George eds., 1996).

Recognitions of the post-revolutionary French governments in late 1792 and early 1793 were guided not by a belief in the Executive's exclusive

authority to make such discretionary decisions, but rather by the conviction that the United States was duty-bound by the law of nations to recognize the sovereignty of any foreign government that was in control of its claimed territory. President Washington never claimed that his power to recognize foreign governments was exclusive, or that it was superior to the legislative power of Congress. While the President was bound by the law of nations, Congress could – and did – enact legislation that overrode the law of nations. *Reinstein Recognition Power* at 12-14 & n.66.[8]

Moreover, with the lone exception of France's embryonic revolutionary government, no nation or government sought recognition from the United States during the Washington administration. Congress failed to instruct President Washington on which countries to recognize not because Congress

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[8] In a statement that had been pre-approved by President Washington, Secretary of State Thomas Jefferson explained the decision to recognize one revolutionary French government by invoking Vattel's mandatory doctrine of *de facto* recognition. Jefferson to Gouverneur Morris, Minister to France (March 12, 1793), *in* 25 *The Papers of Thomas Jefferson* 367 (John Catanzariti et al. eds. 1995) ("*Jefferson Papers*"):

> We surely cannot deny to any nation that right where on our own government is founded, that every one may govern itself according to whatever form it pleases, and change these forms at its own will: and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president or any thing else it may chuse. The will of the nation is the only thing essential to be regarded.

acknowledged that recognition is exclusively the purview of the Executive, but because the Western community of nations had little or no interest in American recognition. "[T]he idea that European nations needed recognition by the United States is fanciful." *Reinstein Recognition Power* at 9.

The Washington administration's alleged "sole control" over the issuance of exequaturs, which were "licenses to foreign consuls allowing them to represent their countries in the United States," is, contrary to the court of appeals' view, not proof of any exclusive recognition authority. "[I]t appears that all foreign consuls who sought and received exequaturs during the Washington administration represented countries with which the United States had [pre-existing] diplomatic relations or treaties." *Reinstein Recognition Power* at 10. The Washington administration's issuance of these documents was a purely ministerial function bereft of any genuine political import.

(2) Adams & Jefferson – Santon Domingo & Haiti

The court of appeals' opinion skips over the administrations of the second and third Presidents. Neither President Adams nor President Jefferson claimed an exclusive "recognition power." But during both administrations Congress exercised that power.

(a) Santo Domingo – In 1800 Congress resolved the status of Santo Domingo – the eastern portion of the island of Hispaniola, now the Dominican Republic – by declaring that it was a colony of France. Robert J. Reinstein, Slavery, *Executive*

Power and International Law: The Haitian Revolution and American Constitutionalism, 53 Am. J. Legal Hist. 141, 161-65 (2013) (hereinafter "*Reinstein Haiti*"). Spain, which had previously controlled Santo Domingo, agreed by treaty to cede that territory to France, but then continued to govern it. The western portion of Hispaniola, known then as St. Domingue (now Haiti), was a French colony under the autonomous control of an insurgent native government led by Toussaint Louverture. *Reinstein Recognition Power* at 14-15.

Congress enacted non-intercourse laws prohibiting Americans from trading with France or its territories. Act of June 13, 1798, ch. 53, 1 Stat. 565, 565. The following year, Congress re-enacted those laws with a provision, known as "Toussaint's Clause," which effectively permitted the President to issue an order allowing Americans to trade with St. Domingue and thereby support the Louverture government. President Adams accepted Congress' invitation and invoked "Toussaint's Clause" to open trade with the St. Domingue ports that were under Louverture's control.

Louverture had seized control of certain ports in Santo Domingo, giving rise to the question whether Santo Domingo was French territory subject to the non-intercourse laws and "Toussaint's Clause." Congress declared in 1800, in re-enacting the non-intercourse laws, that "the whole of the island of Hispaniola shall for the purposes of this act be considered as a dependency of the French Republic." Act of Feb. 27, 1800, ch. 10, § 7, 2 Stat. 7, 10. This

legislation was a unilateral Congressional recognition of a foreign sovereign.

(b) Haiti – The court of appeals' recitation also omitted an 1806 law that rejected Haiti's claim to independence – a law that Supreme Court Justice Bushrod Washington ultimately described as "a clear acknowledgment of the sovereignty of France over the island." *Clark v. United States*, 5 F. Cas. 932, 932-33 (C.C.D. Pa. 1811).

After a 13-year struggle that culminated with a defeat of French military forces, the natives of St. Domingue in 1804 declared their independence from France as the new republic of Haiti. *See generally* Laurent DuBois, *Avengers of the New World: The Story of the Haitian Revolution* (2004). France continued to claim full sovereignty over the island, and threatened a reinvasion. Letter from U.S. Minister Robert R. Livingston to Secretary of State James Madison (May 3, 1804), in 7 *The Papers of James Madison* 131, 136 (David B. Mattern et al. eds., 2005).

President Jefferson adopted a policy of continuing to recognize French sovereignty over St. Domingue, but not prohibiting American trade with Haiti. *See* Letter from Secretary of State James Madison to U.S. Minister Robert R. Livingston (Jan. 31, 1804), in 6 *The Papers of James Madison* 406, 411 (Mary A. Hackett ed., 2002). Jefferson imposed this policy despite French protests that America's ongoing trade with Haiti constituted a violation of French sovereignty over the island. *See* Letter from Pichon to Madison (May 7, 1804), in 7 *The Papers of*

James Madison, Secretary of State Series 185, 188 (Dowdy ed., 1986). French protests of the U.S. policy grew louder, and Congress passed the 1806 Haitian non-intercourse act, which prohibited all commerce with "any person or persons resident within any part of the island of St. Domingo, not in possession, and under the acknowledged government of France " Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351. After reenacting the law in 1807 (Act of Feb. 24, 1807, ch. 17, § 1, 2 Stat. 421, 421-22), Congress replaced the statute two years later with a broader non-intercourse law that applied, *inter alia*, to all French colonies and dependencies. Act of Mar. 1, 1809, ch. 24, 2 Stat. 528, 528-33.

In October 1809 United States authorities seized goods that an American merchant named Clark imported from Haiti. Clark sued for return of his cargo, arguing that the 1809 non-intercourse law did not apply to Haiti because Haiti was independent of France under the law of nations, notwithstanding the fact that France still claimed sovereignty over it. *Clark v. United States*, 5 F. Cas. 932 (C.C.D. Pa. 1811). Supreme Court Justice Bushrod Washington, sitting on circuit, held that even though Haiti had indeed achieved *de facto* independence under the law of nations, the court was bound to apply Congress' 1806 law. Justice Washington concluded (5 F. Cas. at 934) (emphasis added):

> We view the law of 1806, under the circumstances which produced it, *as a clear acknowledgement of the sovereignty of France over the island,* which no subsequent act of our

> government, has in any respect impaired. [. .] So that the government has not only not acknowledged the independence of this island, but has very plainly declared the contrary.

Justice Washington did not look to the position of the Executive branch, but rather began and ended his analysis with the 1806 Congressional enactment. He said, "The court is called upon to construe an act of congress, and to say, whether, within the meaning of the legislature, this island was to be considered as a dependence of France." 5 F. Cas. at 933.

(3) Monroe and Latin America

In 1816, the United Provinces of Rio de la Plata declared independence from Spain. President Monroe then asked his Cabinet whether the Executive possessed "power to acknowledge the independence of new States whose independence has not been acknowledged by the parent country, and between which parties a war actually exists on that account?" James Monroe to the Members of the Cabinet (October 15, 1817), *in* 6 *The Writings of James Monroe* 31 (Stanislaus M. Hamilton ed. 1969).

Representative Henry Clay announced in December 1817 that he intended to introduce a resolution moving the recognition of Buenos Ayres. Secretary of State John Quincy Adams then expressed his own personal view that the President's recognition authority was exclusive. Clay proceeded to introduce a bill that would have appropriated funds for a minister to be sent from the United

States to the de la Plata provinces, but Clay's bill failed to pass. 32 Annals of Cong. 1468-1469 (1818).

In 1819, American and Spanish negotiators signed a treaty in which Spain ceded Florida to the United States. Although the Senate approved the treaty, Spain did not. The Spanish minister insisted that, as a condition for ratification, the United States make a commitment not to recognize the new republics.

In April 1820, Clay renewed his motion to appropriate funds to send a minister to the countries in Latin America that had established their independence. This time, Clay's motion was passed in the House by a narrow vote. 36 Annals of Cong. 1781-1782 (1820).

On February 22, 1821, Spain ratified the Florida treaty, thereby removing the major political barrier to recognition of the new republics. Instead of unilaterally recognizing them – as he could have done if he had agreed with John Quincy Adams' personal view that the President possessed this power exclusively – President Monroe sent a message to Congress urging Congress to act jointly with him in granting recognition because the republics had, *de facto*, secured their independence. To the Senate and House of Representatives of the United States (March 8, 1822), *in Writings of James Monroe*, *supra*, at 207-211. Congress then enacted legislation appropriating $100,000 to fund diplomatic missions to the "independent nations of the American continent." Samuel Flagg Bemis, *The Latin American Policy of the United States: An*

Historical Interpretation 200-201 (1943) (hereinafter "*Bemis*").

The court of appeals' opinion emphasizes the fact that Monroe's Congressional supporters blocked the recognition legislation that Clay had introduced. 725 F.3d at 208. The opinion does not acknowledge that its characterization of the opposition to Clay is a subject of significant dispute among leading scholars of American history.

Legal historian Julius Goebel, Jr., interpreted the failure of Clay's legislation as evidence of widespread Congressional support for an exclusive Executive recognition power. Goebel's view is disputed by two Pulitzer Prize-winning historians, Frederic Paxson and Samuel Flagg Bemis, both of whom attribute the failure of Clay's legislation to foreign policy considerations and partisan politics. *Bemis* at 36-47; Frederic L. Paxson, *The Independence of the South American Republics: A Study in Recognition and Foreign Policy* 174 (2d ed. 1916) (1903) (hereinafter "*Paxson*").

To be sure, some Congressmen – like Representative Alexander Smyth of Virginia – voted against Clay's initiative because they believed that recognition was the exclusive province of the Executive. 725 F.3d at 208. But others in the House considered (i) whether the revolutionary governments had fully wrested control from Spain and the potentially violent consequences of

premature recognition,[9] and (ii) whether Clay's motion was in fact a thinly-veiled personal political attack on President Monroe, who had failed to appoint Clay as secretary of state and had instead nominated John Quincy Adams, who Clay personally despised.[10] *Reinstein Recognition Power* at 19-26.

In 1822, when the dust finally settled in Latin America and stable governments had been established in the new states, President Monroe did not take unilateral recognition action. Instead he reported the situation to Congress and stated that the provinces that had declared their independence "ought to be recognized" under the law of nations. He added that if Congress "entertain[ed] similar sentiments, there may be such cooperation between the two departments of the Government as their

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[9] Representative John Forsyth, Chairman of the House Committee on Foreign Affairs and one of the Monroe administration's principal allies, emphasized the law of nations given that he viewed the civil war between the Spain and the insurgents to be unresolved (32 *Annals of Cong.* 1505-1506, 1509, 1511-1512, 1517-1522 (1818)), and feared that premature recognition of the revolutionary republics could lead to war with Spain. *Id.* at 1503-1505, 1518.

[10] 32 *Annals of Cong.* 1600-1601 (statement of Rep. Hugh Nelson); *id.* at 1634-1635 (statement of Rep. John Forsyth challenging Clay's motives); *Bemis* at 40 (stating that this was Clay's true motive); *Paxson* at 127-129 (stating that Clay's recognition motions might have stemmed from his anger at John Quincy Adams's appointment as Secretary of State); David S. Heidler & Jeanne T. Heidler, *Henry Clay: The Essential American* 129, 133-134, 136 (2010) (describing genesis of the rift between Clay and Monroe, Clay's dislike of Adams, and the popular belief that Clay's recognition motions were an attempt to attack and embarrass Monroe).

respective rights and duties may require." James Monroe, To the Senate and House of Representatives of the United States (Mar. 8, 1822), in *Writings of James Monroe*, at 207-211. Congress responded by enacting an appropriations act providing for official missions to each of the newly independent nations. Act of May 4, 1822, ch. 52, 3 Stat. 678, 678. President Monroe then officially recognized the new Latin American states. *Bemis* at 46-47.[11]

(4) Jackson and Texas

When recognition of the Republic of Texas was in issue, the Congress and the President openly disagreed. In the end, it was President Jackson who blinked while Congress got its way. The court of appeals' opinion attempts to minimize this historical narrative (725 F.3d at 210), but a detailed account provides compelling evidence that President Jackson did not believe that the Executive branch had exclusive recognition power.

The inhabitants of Texas defeated an invading Mexican army in 1836-1837 and established an independent republic. They requested American recognition of the Republic of Texas. President Andrew Jackson advocated neutrality, asserting that under the law of nations recognition of Texas' independence from Mexico was not yet appropriate because it was uncertain whether Texas would be able to repel a second invasion that Mexico was

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[11] The 1822 legislation covered Brazil, which President Monroe recognized in 1825. He was not, therefore, exercising an ***exclusive*** recognition power in recognizing Brazil.

threatening. In addition, he feared that, because Texas also requested annexation, recognition would be viewed by Mexico as an act of aggression by the United States. Andrew Jackson, To the Senate and House of Representatives of the United States (Dec. 21, 1836), in 3 *A Compilation of the Messages and Papers of the Presidents 1789-1908*, at 265-69 (hereinafter "*Jackson on Texas*").

Congress disagreed with Jackson. Both Houses of Congress resolved that the independence of Texas should be recognized "whenever satisfactory information shall be received that it has in successful operation a civil Government capable of performing the duties and fulfilling the obligations of an independent Power." Cong. Globe, 24th Cong., 1st Sess. 453, 479, 486 (1836).

Jackson did not claim any exclusive Executive authority over recognition. To the contrary, he avoided taking a position on the issue now before this Court. He said (*Jackson on Texas* at 267): [12]

> Nor has any deliberate inquiry ever been instituted in Congress or in any of our legislative bodies as to whom belonged the power of originally recognizing a new State –a power the exercise of which is equivalent under some circumstances to a declaration of war; a power nowhere expressly

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[12] Jackson's secretary of state was John Forsyth, who had been one of the leading Monroe allies in the debate over Clay's proposed legislation to recognize the Latin American republics.

> delegated, and only granted in the Constitution as it is necessarily involved in some of the great powers given to Congress, in that given to the President and Senate to form treaties with foreign powers and to appoint ambassadors and other public ministers, and in that conferred upon the President to receive ministers from foreign nations.

Jackson then said that it was unnecessary to resolve this constitutional issue because the prudent course was for Congress and the Executive to work together. He followed with his own opinion that the recognition of Texas was premature, but if Congress disagreed, "I shall promptly and cordially unite with you." *Id.* at 269.

The court of appeals' opinion notes that Jackson stated that he was acquiescing to Congress "on the ground of expediency," and it concludes, based on this term, that in agreeing to recognize Texas "Jackson merely enlisted the support of the Congress as a matter of political prudence." 725 F.3d at 210. Jackson's own explanation, however, invoked the "spirit of the Constitution" and Congress' war powers, thereby contradicting the conclusion that he acted out of "political prudence." *Jackson on Texas* at 267.

The House passed a resolution on February 28, 1837, appropriating funds for a diplomatic envoy to Texas whenever the President "may receive satisfactory evidence that Texas is an independent

power, and shall deem it expedient to appoint such a minister." Cong. Globe, 24th Cong., 2nd Sess. 194 (1837). On the following day, the Senate approved the appropriation of funds and passed a more strongly worded resolution (*id.* at 83, 214):

> Resolved, That the State of Texas having established and maintained an independent Government, capable of performing those duties, foreign and domestic, which appertain to independent Governments, and it appearing that there is no longer any reasonable prospect of the successful prosecution of the war by Mexico against said State, it is expedient and proper, and in perfect conformity with the laws of nations, and the practice of this Government in like cases, that the independent political existence of said State be acknowledged by the Government of the United States.

On his last day in office, President Jackson completed the recognition of Texas by reciting the resolutions passed by the House and Senate and concluding that he now had a "duty" to join in recognizing Texas: "Regarding these proceedings as a virtual decision of the question submitted by me to Congress, *I think it my duty to acquiesce therein*, and therefore I nominate Alcee La Branche, of Louisiana, to be charge d'affaires to the Republic of Texas." Andrew Jackson, *Message to the Senate* (March 3, 1837) (emphasis added), *in* 3 *Andrew Jackson: A Compilation of the Messages and Papers*

of the Presidents, at 366 (James D. Richardson ed. 2004).

(5) Taylor and Hungary

A revolution seeking to replace Austria's monarchical rule with an independent republic erupted in Hungary in 1848. Under instructions from President Taylor, A. Dudley Mann was appointed as a special agent to Hungary. Secretary of State Clayton wrote to Mann on June 18, 1849: "If it shall appear that Hungary is able to maintain the independence she has declared, we desire to be the very first to congratulate her, and to hail, with a hearty welcome her entrance into the family of nations." Letter from Clayton to Mann (June 18, 1849), S. Exec. Doc. No. 31-43, at 3 (1850). Clayton's instructions to Mann, apparently approved by President Taylor, continued with the following observations manifesting the Executive branch's view that Congress had recognition power (*id.* at 5-6; emphasis added):

> Should the new government prove to be, in your opinion, firm and stable, *the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary*; and you might intimate, if you should see fit, that the President would, in that event, be gratified to receive a diplomat agent from Hungary in the United States, by or before the next meeting of Congress; and that he entertains no doubt whatever that, in case her new

> government should prove to be firm and stable, *her independence would be speedily recognized by that enlightened body.*

The Hungarian revolution failed, but this exchange leaves little doubt that President Taylor's administration viewed recognition power as residing with Congress, and not exclusively with the President.

(6) Lincoln and Haiti and Liberia

Because of the combustible issues of race and slavery, neither Haiti nor Liberia was recognized by the United States before the Civil War. In his first message to Congress, President Lincoln urged the recognition of both nations. *Lincoln's First Annual Message to Congress* (Dec. 3, 1861), *in* 6 *A Compilation of Messages and Papers of the Presidents*:

> If any good reason exists why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia, I am unable to discern it. Unwilling, however, to inaugurate a novel policy in regard to them without the approbation of Congress, I submit for your consideration the expediency of an appropriation for maintaining a charge d'affaires near each of these new States.

Congress then enacted a statute recognizing Haiti and Liberia and authorizing the President to appoint diplomatic representatives to Haiti and Liberia. Cong. Globe, 32nd Cong. 2nd Sess. 1814-1815 (April 24, 1862) (Senate); *id.* at 2536 (June 3, 1862) (House). This was followed by an exchange of diplomats and the negotiation of commercial treaties with the two nations. *See* Gordon S. Brown, *Touissaint's Clause: The Founding Fathers and the Haitian Revolution* 235 (2005); Rayford W. Logan, *The Diplomatic Relations of the United States with Haiti* 152 (1941); Tim Matthewson, *A Proslavery Foreign Policy: Haitian-American Relations During the Early Republic* 120-32 (2003).

The court of appeals' opinion asserts that Congress was not exercising recognition power but was merely acceding to the Presidential action by appropriating funds for diplomatic representatives. 725 F.3d at 210. This ignores the language of the statute. It expressly recognized Haiti and Liberia as independent republics and "authorized" the appointment of "diplomatic representatives of the United States to the Republics of Hayti and Liberia, respectively." Congressman Gooch, chairman of the House Committee on Foreign Affairs, introduced the bill with the following statement: "This bill, Mr. Speaker, *provides for the recognition by this Government* of the independence, and the establishment of diplomatic relations with them." Cong. Globe, 37th Cong., 2d Sess. 2498 (1862) (emphasis added).

During debate on the bill it was openly acknowledged that the contemplated legislation

would actually have the effect of recognizing Haiti and Liberia as independent nations. *See, e.g., id.* at 1806 (statement of Sen. Garrett Davis) ("I have not the least objection to the recognition by our Government of the existence of those two republics as independent Powers, and I have no objection to any extent of commercial relations between our country and those two republics."); *id.* (statement of Rep. Thomas Eliot) ("The recognition of Haytien independence is among the duties to be discharged by the present Congress, as an act both of justice and of policy. A bill similar in its provisions to the bill now before the House should have become a law many years ago.").

(7) Lincoln and Mexico

Shortly after the Civil War broke out, Great Britain, Spain and France sent troops into Mexico to collect on debts they were allegedly owed. Britain and Spain reached agreements with the Mexican government, but France sent additional troops to Mexico and started a war. By June 1863, France had captured Mexico City and installed Maximilian of Austria as emperor. J.G. Randall & David Donald, *The Civil War and Reconstruction* 510-12 (2d ed. 1969) (hereinafter "*Randall & Donald*").

Lincoln's secretary of state, William Seward, protested France's actions, but the Lincoln administration feared that France might be incited to retaliate against Lincoln by recognizing the Confederacy's independence. Samuel Flagg Bemis, *A Diplomatic History of the United States*, pp. 372-373, 393 (4th ed. 1955); *Randall & Donald* at 512.

The House of Representatives, however, unanimously passed a resolution condemning France's actions in Mexico as "deplorable" and declaring that it would be antithetical to U.S. policy to recognize "any monarchical Government erected on the ruins of any republican government in America under the auspices of any European Power." Cong. Globe, 38th Cong., 1st Sess. 1408 (1864).

The French Minister for Foreign Affairs then confronted William Dayton, the U.S. Minister to France, and asked, "Do you bring us peace or bring us war?" *Id.* at 2475 (letter from Dayton to Seward, Apr. 22, 1864). Seward directed Dayton to pacify the French government by explaining that recognition of a foreign government "is a practical and purely executive question, and the decision of it belongs not to the House of Representatives, or even to Congress, but to the President of the United States." *Id.* (letter from Seward to Dayton, April 7, 1864). Dayton was instructed to state that the Lincoln administration had not changed its policy of neutrality. *Id.*

Seward's correspondence with Dayton was subsequently provided to Congress. The House went on record with a resolution asserting that "Congress has a Constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States and it is the Constitutional duty of the executive department to respect that policy, not less in diplomatic negotiations than in the use of national forces when authorized by law " Cong. Globe, 38th Cong., 2d Sess. 65-67 (1864). The Senate Foreign Relations Committee did not bring the original House resolution regarding Mexico to the

floor. Senator Sumner, chairman of the committee, declared that it would be "madness" to pass it because of the potentially disastrous consequences. Cong. Globe, 37th Cong., 3d Sess. 694-95, 704 (1863). Neither he nor any other Senator suggested that the President had exclusive recognition authority.

This was not, as the court of appeals conjectured, an instance in which Congress yielded to Seward's "challenge." 725 F.3d at 208. Two years earlier, in the recognition of Haiti and Liberia, Congress had vigorously articulated its own authority. *See* p. 52, *supra*. Given the contemporaneous circumstances, in 1863 it chose prudence over recklessness.

(8) McKinley and Cuba

On April 11, 1898, President McKinley requested that Congress authorize him to use American military forces in Cuba to establish "a stable government, capable of maintaining order and observing its international obligations." 31 Cong. Rec. 3699-3702 (1898). McKinley refused to recognize Cuban independence from Spanish rule. Quoting President Jackson's letter on Texas, he asserted that such recognition would be improper under the law of nations. *Id.* at 3700-3701.

Two days later, the House Committee on Foreign Affairs introduced a proposed joint resolution that was consistent with McKinley's message. *Id.* at 3810. An amendment that would have explicitly recognized the "Republic of Cuba" (which was the insurgent government leading the rebellion against Spain) was defeated on grounds that such

recognition was inappropriate under the law of nations. *Id.* at 3818-3819. On the same day, the Senate Committee on Foreign Relations proposed a joint resolution that declared that "the people of the Island of Cuba are, and of right ought to be, free and independent, and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that island." *Id.* at 3993.

The Senate and House compromised by deleting language recognizing the insurgent government (called the "Republic of Cuba"), but the resolution retained a clause recognizing Cuban independence from Spain. *Id.* at 4040-4041. Some legislators voiced concern that this constituted an impermissible usurpation of the Executive's recognition power, but the majority voted for the resolution. *Id.* at 4033. President McKinley signed the resolution into law even though it reversed his policy of refusing to recognize Cuban independence from Spain. Act of Apr. 20, 1898, ch. 24, 30 Stat. 738 (1898). The final version of the joint resolution was titled "Joint Resolution [f]or the recognition of the independence of the people of Cuba," and the first resolution was "that the people of the Island of Cuba are, and of right ought to be, free and independent."

Contrary to the suggestion of the court of appeals (725 F.3d at 208-209), this was far from an instance of Congressional acquiescence to an exclusive Presidential power to recognize foreign sovereigns. In fact, employing the language of the Declaration of Independence, Congress legislatively recognized the independence of the Cuban people from Spanish

colonial rule and overruled President McKinley's contrary recognition policy.

(9) Summary of Post-Ratification History

The post-ratification history of the recognition power, summarized in the chart on the following page, establishes that Congress engaged in legislative recognition of foreign governments and participated in the recognition process. This history refutes the State Department's assertion, adopted by the court below, that the Executive has "exclusive" recognition authority. History supports Professor Reinstein's conclusion that the President's recognition power is not "plenary," and that "executive recognition decisions are not exclusive but are subject to laws enacted by Congress." *Reinstein Recognition Power* at 60.

Year/ Sovereign	President (Congress)	Action – (Reinstein pages)
1795 *France*	Washington (n/a)	President's recognition based on law of nations. (pp. 9-14)
1800 *Santo Domingo*	Adams (6th Cong., 1st Sess.)	Congressional recognition of sovereignty. (pp. 14-15)
1806 *St. Domingue*	Jefferson (9th Cong., 1st Sess.)	Congressional recognition of sovereignty. (pp. 15-18)
1818 *Latin American Republics*	Monroe (15th Cong., 1st Sess.)	Presidential "cooperation" with Congress. (pp. 19-26)
1837 *Texas*	Jackson (24th Cong., 2nd Sess.)	Presidential deferral to Congress' recognition (pp. 26-30)
1849 *Hungary*	Taylor (31st Cong., 1st Sess.)	Presidential "recommendation" that Congress recognize.
1862 *Haiti & Liberia*	Lincoln (37th Cong., 2nd Sess.)	Congressional expression of recognition by statute. (pp. 30-32)
1864 *Mexico*	Lincoln (38th Cong., 2nd Sess.)	Congressional expression of its "authoritative voice.' (pp. 32-35)
1898 *Cuba*	McKinley (55th Cong., 2nd Sess.)	Congressional recog-nition of peoples' inde-pendence. (pp. 35-41)

III.

DICTA IN THIS COURT'S OPINIONS DID NOT CONCERN DISAGREEMENT BETWEEN CONGRESS AND THE PRESIDENT

The court of appeals referred several times to its status as an "inferior" court and to its obligation to comply with *dicta* in this Court's opinions.[13] Language in decisions like *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), describe the recognition power as belonging to "the Executive." These cases do not, however, address whether the recognition power is exclusive with the President or is shared with the Congress. They relate to whether the Judiciary plays any role in the recognition process.

To be sure, when there is no controversy, the President unilaterally makes a recognition decision and appoints an ambassador who is subject to Senatorial consent. The issue in this case concerns the less frequent instance – acknowledged never to have been confronted and decided by this Court –in which Congress disagrees with the President. The issue then is not whether the President has any recognition power; it is whether he has "exclusive" authority. The history we have recited demonstrates that neither Presidents nor Congresses have, when

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[13] Early during the oral argument by petitioner's counsel in the lower court, Judge Tatel noted that the court of appeals was a "lower federal court" and was "bound by Supreme Court dicta." Transcript of Oral Argument, No. 07-5347, March 19, 2013, pp. 7-8.

recognition is controversial, viewed the recognition power as committed ***exclusively*** to the discretion of the Executive Branch.

This Court's opinion in *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839), declared only that the President's determination regarding jurisdiction over the Falkland Islands was "conclusive on the judicial department." It did not address the question presented by this case – *i.e.*, the authority of Congress to legislate in this area.

The decisions of this Court that followed United States' recognition of the Soviet Union did not concern the constitutionality of a Congressional attempt to constrain the President's exercise of a recognition power. Hence language in this Court's opinions that spoke of recognition as an "executive function" (*United States v. Pink*, 315 U.S. 203, 230 (1942)) did not address cases where there is a dispute between the President and Congress. *See* Note, 127 Harv. L. Rev. 2154, 2160 (2014) (D.C. Circuit opinion in this case criticized for using "evidence of inherent power to support a claim of exclusive power").

Dicta in opinions of this Court are not one-sided. Many assign recognition authority to both Congress and the President. *See Boumedienne v. Bush*, 553 U.S. 723, 753 (2008) ("[T]he Court has held that questions of sovereignty are for *the political branches* to decide" (emphasis added)); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("[T]he determination of sovereignty over an area is for *the legislative and executive departments*")

(emphasis added)); *Jones v. United States*, 137 U.S. 202, 214 (1890) ("All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts *of the legislature and executive.* ") (emphasis added)); *Cherokee Nation v. Georgia*, 30 U.S. 1, 46-47 (1831) ("[T]he existence of foreign states cannot be known to this court judicially except by some act or recognition of *the other departments of this government.*") (emphasis added)).

Justice Sutherland's celebrated and much-criticized *dictum* in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936), is frequently cited to support the proposition that the President has "the very delicate, plenary and exclusive power as the sole organ of the federal government in the field of international relations." In the *Curtiss-Wright* case, however, the President was acting under a broad delegation of authority conferred by Congress. Indeed, Justice Sutherland noted, "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." 299 U.S. at 223.

This Court cited the *Curtiss-Wright* opinion as granting broad Presidential authority when the

President acts in the foreign-policy arena pursuant to a Congressional mandate. *Republic of Iraq v. Beaty*, 556 U.S. 848, 856-857 (2009). In these circumstances, Congress "think[s] it prudent to afford the President some flexibility." *Id.* That principle does not apply, however, when the President acts without Congressional authorization or, as in this case, contrary to Congress' policy as expressed in a duly enacted law.

Petitioner's counsel acknowledged during oral argument of this case in November 2011 in response to Justice Kennedy's question, that only the President may communicate the Nation's foreign policy to foreign countries. *Transcript*, pp. 5-6. In this same vein, Justice Scalia observed during the Solicitor General's oral argument that "nobody except the President of the United States pronounces the foreign policy." He added, however, that "to be the sole instrument and to determine the foreign policy are two quite different things." *Transcript*, p. 38.

Justice Kennedy asked during the November 2011 oral argument whether any treatise writer or decision of this Court supports a severe limitation on the President's foreign-affairs power when Congress disagrees with the President. *Transcript*, p. 6. In his authoritative study of constitutional law governing foreign affairs authority, Professor Louis Henkin declared that "in the competition for power in foreign relations," Congress has an "impressive array of powers expressly enumerated in the Constitution." Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. Oxford Univ. Press, 2d ed. 1996)

63-82. Professor Henkin quoted in this regard the 1864 House Resolution passed during the incident involving France and Mexico. *See* p. 54, *supra*.

Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952), has been adopted by this Court as "the accepted framework for evaluating executive action in this [foreign-policy] area." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). That concurring opinion sets out a "familiar tripartite scheme." *Id.* This case falls within Justice Jackson's third category – "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637. Hence "his power is at its lowest ebb," and the President's "claim to a power at once so conclusive and preclusive must be scrutinized with caution." 343 U.S. at 638. The State Department's bar against designation of "Israel" on the passport or birth certificate of a Jerusalem-born American citizen cannot withstand such scrutiny.

During oral argument of this case in November 2011, the Chief Justice questioned whether *Medellin* applied here because in *Medellin* the President's action changed "domestic State law." *Transcript*, p. 11. The *Medellin* majority opinion, however, took "domestic State law" into account. It invoked Justice Jackson's "tripartite scheme" and denied authority the President had exercised when Congress had refused to authorize it after concluding that the President had "plainly compelling" justification for overriding State law. 552 U.S. at 524.

Consequently, even if the State Department's view regarding "Israel" as a place-of-birth for Jerusalem natives were "compelling" (which it is not, *see* pp. 64-65, *infra*), Congress' directive in Section 214(d) would override the State Department's view under Justice Jackson's "tripartite test."

IV.

ENFORCEMENT OF SECTION 214(d) WILL HAVE NEGLIGIBLE IMPACT ON AMERICAN FOREIGN POLICY

The State Department's justification for rejecting "Israel" as a permissible place of birth for citizens born in Jerusalem rests on a concern over mistaken *perception* by Palestinians. The Department fears, according to its response to Interrogatories, that Palestinians would conclude that American policy regarding Jerusalem has been "dramatically reversed." JA 53.

In fact, the FAM grants Palestinian-American passport-holders great leeway in selecting a place of birth for their passports. Consular officers and Department of State officials have been instructed, in virtually every instance other than the case of Jerusalem-born citizens, to apply the place-of-birth requirement flexibly in order to accommodate the personal ideologies and prejudices of passport-holders. *See* pp. 9-11, *supra*.

There are currently approximately 100,000 American citizens whose passports state that they were born in "Israel" because they were born in cities

like Tel Aviv, Haifa, or Beersheba – all of which have been recognized since 1948 as being within Israel. The practical effect of implementing Section 214(d) is to add a potential 50,000 Americans born in Jerusalem to those whose passports say "Israel."

Contrary to the concern expressed by the court of appeals that courts are "not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d)" (725 F.3d at 219) and the Chief Justice's inquiry during oral argument whether a decision in petitioner's favor would mean that this Court "know[s] foreign policy better" than the President (*Transcript*, p.13), this is not a case in which the separation-of-powers dispute is between the ***courts*** and the President. It is Congress that disagreed with the President's foreign-policy judgment. Congress' mandate in these circumstances does not depend on a sophisticated foreign-policy analysis. The State Department's stated justification for its practice must be subjected to the "scrutiny" prescribed by Justice Jackson's *Steel Seizure* opinion for Presidential measures in "category three." *See* p. 62, *supra*. Such "scrutiny" demonstrates the weakness of the Executive branch practice and its invalidity in the face of Congress' contrary finding.

Moreover, the history of the place-of-birth entry on a passport and the explanation given by the government in deposition and in its response to discovery demonstrate conclusively that the place-of-birth entry on a passport is designed not for any

foreign-policy purpose but only to identify the passport-holder. *See* pp. 8-9, *supra*. [14]

The government has exaggerated the impact of Section 214(d) and cannot resist repeating – the refrain – in every brief it has filed in this case that the case concerns the "status of Jerusalem" – "one of the most sensitive and long-standing disputes in the Arab-Israeli conflict." Brief for the Respondent in Opposition, No. 13-628, p. 2; *see also* Brief for the Respondent, No. 10-699, p. 2; *see also* Brief for the Respondent in Opposition, No. 10-699, p. 2; *see also* Brief for the Appellee, D.C. Cir. No. 07-5347, p. 2. When this litigation made its first appearance in this Court, the Court rejected that overblown assertion. It held that "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored

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[14] The government acknowledged in discovery that because of "clerical errors" some United States passports and CRBAs specifying "Israel" have been issued to citizens born in Jerusalem. JA 64-66. No "severe adverse consequences" have resulted from the "erroneous" governmental issuance of these documents.

Nor is the prohibition applied to passports and CRBAs by the State Department universal throughout the Executive Branch. The *amicus curiae* brief of the Zionist Organization of America filed when this case was before the Court in its 2011 Term reported that in many Executive Branch departments the designation "Jerusalem, Israel" appears. Identification of Jerusalem within Israel by Departments such as the Departments of Justice, State, and Defense has not led to protests and condemnations by Palestinians.

determination of what United States policy toward Jerusalem should be." 132 S. Ct. at 1427.

The time has finally come for a hard-headed unemotional appraisal of the true legal issue in this case – petitioner's request "that the courts enforce a specific statutory right." *Id.* Now – more than a decade after his parents brought this lawsuit for him – petitioner respectfully asks this Court to grant him his "specific statutory right."

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed with instructions to enter summary judgment for the plaintiff and order the Secretary of State immediately to enforce and implement Section 214(d).

Respectfully submitted,

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In accordance with longstanding policy, the President, through the actions of the Secretary of State, has recognized no state as having sovereignty over the city of Jerusalem, and has instead left this highly sensitive issue to be resolved through negotiations by the foreign parties to that dispute. In order to implement that policy, the Secretary of State lists "Jerusalem" instead of "Israel" as the birthplace in passports, and in consular reports of births abroad, of U.S. citizens born in that city. In 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, Section 214(d) of which states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. 1366. The question presented is:

Whether Section 214(d) impermissibly infringes the President's power to recognize foreign sovereigns.

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In the Supreme Court of the United States

No. 13-628

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

The status of Jerusalem is one of the most sensitive flash points in the Arab-Israeli conflict. Since 1948, when President Truman recognized the State of Israel, the United States' consistent foreign policy has been to recognize no state as having sovereignty over Jerusalem. This policy reflects the Executive's assessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is lo-

cated within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." J.A. 55-56. The Executive likewise does not recognize Palestinian sovereignty in Jerusalem.

The State Department has implemented that policy in its rules regarding place-of-birth designations in passports and consular reports of birth abroad issued to U.S. citizens born in Jerusalem. Only "Jerusalem" is recorded as the birthplace of U.S. citizens born in that city. Petitioner challenges this policy, seeking to have "Israel" designated as his birthplace. He relies on Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, which requires the State Department to make such a designation upon request. Pub. L. No. 107-228, 116 Stat. 1350, 1366 (capitalization altered).

1. a. When Israel declared independence in 1948, President Truman immediately recognized the new state. See *Statement by the President Announcing Recognition of the State of Israel*, 1948 Pub. Papers 258 (May 14, 1948). But the United States did not recognize Israeli sovereignty over any part of Jerusalem. Nor did it recognize Jordanian sovereignty over the part of the city it controlled. That same year, the United Nations General Assembly, with United States support, passed a resolution stating that Jerusalem "should be accorded special and separate treatment from the rest of Palestine." G.A. Res. 194 (III), ¶ 8, U.N. Doc. A/RES/194(III) (Dec. 11, 1948). In 1949, when Israel announced an inaugural meeting of its Parliament in Jerusalem, the Truman Administration declined to send a representative because "the United

States cannot support any arrangement which would purport to authorize the establishment of Israeli * * * sovereignty over parts of the Jerusalem area." 6 U.S. Dep't of State, *Foreign Relations of the United States 1949: The Near East, South Asia, and Africa* 739 (1977).

In 1967, Israel established control over the entire city of Jerusalem. In subsequent United Nations proceedings, the United States stated that the "continuing policy of the United States Government" was that "the status of Jerusalem * * * should be decided not unilaterally but in consultation with all concerned." U.N. GAOR, 5th Emergency Sess., 1554th plen. mtg. at 10, U.N. Doc. A/PV.1554 (July 14, 1967). The United States emphasized that it did not recognize any Israeli measures as "altering the status of Jerusalem" or "prejudging the final and permanent status of Jerusalem."[1] *Ibid.*

In 1993, with the assistance of the United States, representatives of Israel and of the Palestinian people agreed that the status of Jerusalem is a core issue to be addressed bilaterally in permanent status negotiations. J.A. 53-54; *Declaration of Principles on Interim Self-Government Arrangements*, Art. V (Sept. 13, 1993), http://www.unsco.org/Documents/Key/Declaration%20of%20Principles%20on%20Interim%20Self-Government%20Arrangements.pdf. Subsequently, both President George W. Bush and President Obama sought to as-

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[1] Every President since Truman has taken the same position. See, *e.g.*, Ronald Reagan, *Address to the Nation on United States Policy for Peace in the Middle East*, 1982 Pub. Papers 1093-1097 (Sept. 3, 1982); 17 U.S. Dep't of State, *Foreign Relations of the United States, 1961-1963: Near East 1961-1962*, at 414-416 (1994) (Kennedy Administration).

sist the parties in establishing negotiations on all outstanding issues, including Jerusalem's status. See *Remarks by President Obama in Address to the United Nations General Assembly* (Sept. 21, 2011), http://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly; *President Bush Discusses the Middle East* (July 16, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070716-7.html.

Within this "highly sensitive" and "potentially volatile" context, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition," of Jerusalem as "a city located within the sovereign territory of Israel." J.A. 56. This policy is rooted in the Executive's longstanding assessment that any such action would "discredit[] our facilitative role in promoting a negotiated settlement," which would be "damaging to the cause of peace and * * * therefore not * * * in the interest of the United States." Letter from George P. Shultz, Sec'y of State, to Charles H. Percy (Feb. 13, 1984), in *American Embassy in Israel: Hearing on S. 2031 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 13-14 (1984) (*Embassy Hearing*). That assessment affects a range of United States actions. In particular, the United States maintains its embassy in Tel Aviv.[2] J.A. 55.

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[2] According to public sources, no country presently maintains its embassy in Jerusalem. See Israel Gateway, *Foreign Embassies in Israel*, http://www.israelgateway.com/foreign-embassies/ (last visited Sept. 18, 2014).

b. The United States' position on Jerusalem is reflected in the State Department's policies for preparing passports and reports of birth abroad of U.S. citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the applicant's birthplace at the time of issuance is recorded in the passport. See J.A. 109 (reprinting U.S. Dep't of State, 7 *Foreign Affairs Manual* (FAM) 1383.1 (1987), which is the version relevant to this case). Accordingly, only "Jerusalem" is recorded in the passports of U.S. citizens born in that city. J.A. 113. Similarly, only "West Bank," "Gaza Strip," or the town of birth is designated for U.S. citizens born in those territories. J.A. 112-113.

The State Department's passport policy reflects its determination that recording "Israel" in passports of U.S. citizens born in Jerusalem would be perceived internationally as a "reversal of U.S. policy on Jerusalem's status" that "would be immediately and publicly known." J.A. 58. That change could significantly harm "U.S. national security interests," J.A. 52, and "cause irreversible damage" to the United States' ability to facilitate the peace process, J.A. 56.

2. a. Congress has occasionally considered legislation to constrain the Executive Branch's ability to implement its recognition policy concerning Jerusalem. In 1983, Congress considered a bill that would have required the U.S. Embassy in Israel to move to Jerusalem. See S. 2031, 98th Cong., 1st Sess. The Reagan Administration opposed the bill because it would encroach on "the President's exclusive constitutional power" over recognition. *Embassy Hearing* 13-14, 58-59. The bill was not enacted.

In 1995, Congress passed the Jerusalem Embassy Act, which conditions a portion of State Department funding on moving the U.S. Embassy to Jerusalem. Pub. L. No. 104-45, § 3(a), (b), 109 Stat. 398-399. After the Justice Department's Office of Legal Counsel advised the President that the bill would unconstitutionally infringe the President's recognition power, see *Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123 (1995), the statute was enacted with a waiver provision that permits the President to suspend the funding restriction. § 7(a), 109 Stat. 400. Presidents Clinton, Bush, and Obama have consistently invoked that provision to maintain the embassy in Tel Aviv. See, *e.g.*, 79 Fed. Reg. 33,837 (June 12, 2014).

b. In 2002, Congress passed the Foreign Relations Authorization Act. Section 214 of that Act, at issue in this case, is entitled "United States policy with respect to Jerusalem as the capital of Israel." 116 Stat. 1365 (capitalization altered). All of its provisions address the status of Jerusalem.

Subsection (a) "urges the President * * * to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." 116 Stat. 1365. Subsection (b) states that none of the funds authorized under the Act may be used to operate the U.S. consulate in Jerusalem except "under the supervision of the United States Ambassador to Israel." 116 Stat. 1365-1366. Subsection (c) states that none of those funds may be used for publication of any "official government document * * * unless the publication identifies Jerusalem as the capital of Israel." 116 Stat. 1366. And Subsection (d), on which petitioner relies, states that, "[f]or purposes of the registra-

tion of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Ibid.*

In his signing statement, President Bush stated that if Section 214 were construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002). The statement further asserted that "U.S. policy regarding Jerusalem has not changed." *Ibid.*

3. Petitioner is a U.S. citizen born in Jerusalem in 2002. J.A. 18-19. Petitioner's mother applied for a U.S. passport and a report of birth abroad for petitioner, listing his place of birth as "Jerusalem, Israel." J.A. 20. In accordance with State Department policy, U.S. officials recorded "Jerusalem" as petitioner's place of birth on the official documents. *Ibid.*

Petitioner's parents then filed this suit on his behalf, seeking to compel the State Department to identify petitioner's birthplace as "Israel." J.A. 20-21.

The district court initially dismissed the complaint on standing and political-question grounds. No. 03-1921, 2004 WL 5835212 (Sept. 7, 2004). The court of appeals reversed and remanded. 444 F.3d 614, 619-620 (2006). The district court again dismissed on political-question grounds, 511 F. Supp. 2d 97 (2007),

and the court of appeals affirmed, 571 F.3d 1227, 1233 (2009).

This Court granted certiorari, vacated the court of appeals' decision, and remanded for further proceedings. 132 S. Ct. 1421, 1431 (2012). The Court held that petitioner's claim did not present a nonjusticiable political question. *Id.* at 1427. Although the Court had requested briefing on whether Section 214(d) is an unconstitutional intrusion on the Executive Branch's recognition power, it elected not to reach that question. *Id.* at 1430.

4. On remand, the court of appeals held that Section 214(d) impermissibly intrudes on the President's exclusive recognition power. Pet. App. 1a-50a.

The court of appeals first held that the Constitution confers the power to recognize foreign states and governments exclusively on the Executive Branch. The court relied on the President's power to receive ambassadors, U.S. Const. Art. II, § 3, as well as his wide range of foreign-affairs powers, Pet. App. 6a-17a, 35a-36a. Explaining that the Executive Branch had repeatedly acted unilaterally in recognizing foreign entities and in setting the United States' recognition policies, and that Congress had repeatedly acquiesced therein, the court concluded that the "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." *Id.* at 20a-26a & n.12.

The court of appeals then held that Section 214(d) unconstitutionally infringes on that power. Pet. App. 36a-50a. Section 214(d), the court concluded, improperly purported to establish "United States policy with respect to Jerusalem as the capital of Israel," *id.* at 44a (quoting Section 214's title) (capitalization altered

and italicization omitted), because it would "signal" that the United States "recognizes" Israel's sovereignty over Jerusalem, *id.* at 42a (quoting J.A. 56).

Judge Tatel concurred in the court's opinion. He also wrote separately to emphasize that the "critical question" was whether Section 214(d) in fact infringed on the President's exclusive recognition power, and that, in this case, Congress agreed that it does. Pet. App. 55a, 60a-61a.

SUMMARY OF ARGUMENT

I. The Constitution's text and structure establish that the President has exclusive authority to recognize foreign states and their governments, as well as the territorial limits of their sovereignty. Recognition is an official determination that the United States will treat an entity as a state or government, and it is the predicate from which the Nation's foreign relations proceed. The principle that the Nation must speak with one voice in foreign affairs, see *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936), therefore applies with particular force to recognition decisions.

The Constitution assigns to the President both the sole power to make recognition decisions and the authority to conduct foreign relations based on those decisions. In particular, Article II confers on the President the power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. That power was understood at the time of the Founding to include the authority to determine whether the sending state or government should be recognized as sovereign. Article II reinforces the President's recognition power by assigning to him broad authority to conduct the Nation's foreign relations, including sole

power to decide whether and with which states to establish diplomatic relations or negotiate a treaty. *Id.* § 2, Cl. 2.

By contrast, the Constitution makes no provision for the Congress to participate in recognition decisions, or to override the President's decisions. The Senate's power to advise and consent on appointments and treaties does not permit it to override the Presidential recognition decisions that the nomination or proposed treaty may reflect. Congress, moreover, lacks any enumerated power that would permit it to make recognition decisions.

The political Branches' relative institutional capabilities confirm that recognition decisions must be made by the President alone. The decision whether to recognize a foreign state or government, or its territorial boundaries, requires careful and often nuanced decisions about whether the state or government exists and controls particular territory and whether recognition (or withholding recognition) will serve the United States' foreign-relations and national-security interests. Only the Executive is capable of gathering the information needed to make those judgments in a timely and decisive manner. See *Curtiss-Wright*, 299 U.S. at 320. And because the Constitution provides no framework for the Legislative and Executive Branches to share the recognition power, exclusive commitment to the Executive is necessary to ensure that the Nation speaks with one voice in foreign affairs.

More than two hundred years of historical practice confirm that the recognition power belongs exclusively to the Executive. The Executive has unilaterally made hundreds of recognition decisions concerning states, governments, and territorial shifts. Occasional

congressional attempts to unilaterally determine recognition policy were invariably rebuffed. Petitioner is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition—either by rejecting a President's recognition decision or by making a decision the President was unwilling to make unilaterally.

II. Section 214(d), which purports to establish "United States policy with respect to Jerusalem as the capital of Israel," see Pub. L. No. 107-228, 116 Stat. 1350, 1366, encroaches on the President's exclusive constitutional authority to recognize foreign sovereigns. Since Israel's founding, U.S. Presidents have followed a consistent policy of recognizing no state as having sovereignty over Jerusalem. Section 214(d) purports to require the President simultaneously to express precisely the opposite view in official communications with foreign sovereigns—and to do so at the behest of individual citizens seeking to express their personal views on what the Nation's position should be.

The Executive historically has been understood to possess inherent constitutional authority to determine passport content as it pertains to the conduct of diplomacy. Although Congress may enact passport legislation in furtherance of its enumerated powers, it may not encroach on the President's use of passports as instruments of diplomacy. Section 214(d) bears no apparent relation to Congress's enumerated powers over foreign commerce and naturalization—the only sources of authority petitioner and his amici identify as supporting Section 214(d)—and it bears no resemblance to the passport regulations Congress has historically enacted. Thus, although petitioner seeks to

justify Section 214(d) as "passport legislation" (Br. 19), that label fairly describes Section 214(d) only insofar as the provision uses passports as a vehicle to accomplish a recognition-related purpose.

The Executive's practice of designating "Jerusalem" as the birthplace on passports implements the President's recognition position. By reversing that practice, Section 214(d) would force the Executive to convey to foreign sovereigns that—contrary to the President's longstanding recognition position—the United States has concluded that Israel exercises sovereignty over Jerusalem. A decision by this Court requiring the Executive to implement Section 214(d) would thus result in significant uncertainty about the United States' position and undermine the President's ability to effectively exercise and implement his recognition power. It would also force the Executive to take an inconsistent position in conducting foreign relations on behalf of the United States, thereby undermining the President's credibility and his conduct of sensitive diplomatic efforts.

ARGUMENT

I. THE CONSTITUTION GRANTS THE PRESIDENT EXCLUSIVE POWER TO RECOGNIZE FOREIGN STATES AND THEIR TERRITORIAL BOUNDARIES

A. The Constitution Assigns Exclusively To The Executive The Authority To Recognize Foreign States And Governments, Including Their Territorial Boundaries

The decision to recognize a foreign state or its government is an official conclusion by the United States that the entity in question meets the requirements of a state or government, and should be treated as such in this Nation's foreign relations. Recognizing a gov-

ernment entails recognizing the existence of the state ruled by that government, which in turn entails determining the territorial boundaries (*i.e.*, the extent of the state's sovereignty) that will be recognized. Because the establishment of diplomatic relations and negotiation of treaties with states are predicated on recognition of the state and government in question, recognition decisions establish the foundation for the conduct of the Nation's foreign affairs.

The text and structure of the Constitution's foreign-affairs provisions establish that the President has sole recognition authority. By contrast, the Constitution's text prescribes no role for the Congress in recognition decisions, and that body lacks the institutional capability to make the timely, informed and nuanced judgments required to exercise the recognition power in a manner that advances the Nation's foreign-relations interests. And because the Constitution provides no mechanism by which the Legislative and Executive Branches could share the recognition power, exclusive commitment of the recognition power to the Executive is necessary to ensure that the Nation speaks with one voice in foreign affairs.

1. Article II of the Constitution assigns the recognition power to the President

a. The Reception Clause confers recognition power on the President

The primary source of the President's recognition power is Article II's grant of authority to the President alone to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. That authority necessarily includes the power to decide which ambas-

sadors the President will receive, and therefore the power to decide whether to establish diplomatic relations with a foreign entity. Because establishing diplomatic relations with a foreign entity entails determining that the entity should be treated as a state, the recognition power is vested solely in the President. See 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1560, at 415-416 (1833) (*Story*).

The recognition power received no attention during debates on ratification of the Constitution. But during the Washington Administration, members of the Founding generation expressed, and acted on, the understanding that the Reception Clause conferred on the President the power to recognize foreign sovereigns. In 1793, President Washington and his Cabinet debated whether to receive Edmond Genet, minister of the new government of France. Thomas Jefferson, then Secretary of State, informed Washington that receiving a foreign minister was equivalent to recognizing the sovereignty of the government he represented: "[t]he reception of the Minister at all * * * is an ackno[w]le[d]gement of the legitimacy of their government." Opinion on the Treaties with France (Apr. 28, 1793), in 25 *The Papers of Thomas Jefferson* 612 (1992) (*Jefferson Papers*). Alexander Hamilton, then Secretary of the Treasury, concurred, stating that "acknowledgment of a government" would be accomplished "by the reception of its ambassador." Letter from Hamilton to Washington (Apr. 1793), in 4 *The Works of Alexander Hamilton* 394 (1904); see Alexander Hamilton, *Pacificus No. 1*, in *The Letters of Pacificus and Helvidius* 13, 14 (Gideon ed., 1845) (the President "acknowledged the republic of France, by

the reception of its minister"). Thus, although Hamilton had earlier described the authority to receive ambassadors as ceremonial in nature, *The Federalist No. 69*, at 468 (Jacob E. Cooke ed., 1961), by 1793, he had come to understand that the decision whether to receive an ambassador necessarily includes the power to decide whether to acknowledge the government that the minister represents.

The view that receiving a minister entailed recognizing his state and government is fully consistent with contemporary treatises on the law of nations—treatises to which the Washington Cabinet often referred in its conduct of foreign affairs. See, *e.g.*, 25 *Jefferson Papers* 608-619. Under the law of nations, a state to which a minister was sent could decide whether to acknowledge the sending state's sovereignty by receiving the minister. Thus, according to Vattel, receiving a minister was equivalent to acknowledging the sovereign nature of the sending state or government. Emmerich de Vattel, *The Law of Nations* Bk. IV § 68, at 457-458 (Joseph Chitty trans., 1853) (first published 1758) (*Vattel*). Formal reception accordingly entitled the minister to specific protections, such as immunity, that flowed from recognition of the sovereign nature of the sending government, *i.e.*, the principle that the "respect which is due to sovereigns should redound to their representatives."[3] *Id.* § 80, at 463; *id.* § 82, at 465; see 2 Hugo Grotius, *The Rights of War and Peace* 215 (A.C. Campbell trans., 1814) (first published 1625) (only ministers "who are sent by the

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[3] See also *The Federalist No. 81*, at 548 (Hamilton) (this Court's original jurisdiction over cases "affecting Ambassadors, other public ministers and consuls" (Art. III, § 2, Cl. 2) reflects "respect to the sovereignties they represent").

sovereigns of independent countries to each other" may be received and accorded protections); 2 Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* 202-207 (Tenney Frank trans., 1930) (first published 1737). Conversely, to refuse to receive an ambassador was to "contest[] the[] sovereign dignity" of the sending state or government. *Vattel* Bk. IV § 78, at 461. The principle that a foreign minister was entitled to protection arising from the sovereign he represented was also well-recognized under United States law. See *The Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 138-139 (1812).

The Washington Administration's understanding of the Reception Clause was also consistent with the Revolutionary-War-era practice of European nations. In 1782, the Netherlands recognized the United States by issuing a resolution directing that John Adams should be formally received as the "minister plenipotentiary" of the United States. 5 Francis Wharton, *The Revolutionary Diplomatic Correspondence of the United States* 319-320, 325 (1889) (excerpt of resolution). Conversely, when John Jay sought recognition from Spain in 1782, Spanish officials met with him informally, so as not to "imply any recognition of the United States." Samuel Flagg Bemis, *The Diplomacy of the American Revolution* 216 (1957); see *id.* at 104.

b. The President's other foreign-affairs powers reinforce his recognition power

The President's recognition power is further grounded in the Constitution's assignment of the bulk of foreign-affairs powers to the President. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1, Cl. 1. "[T]he historical gloss on the

'executive Power' * * * has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)).

i. Under the Articles of Confederation, Congress had sole responsibility for foreign-relations, including day-to-day diplomacy. Art. IX, Para. 1. That arrangement proved cumbersome and ineffectual, as Congress was unable to respond quickly or adhere to consistent policies. See Louis Henkin, *Foreign Affairs and the United States Constitution* 27 (2d ed. 1996) (*Henkin*). In the Constitution, the Framers therefore transferred most foreign-affairs powers to the President. As Jefferson observed in 1790, "[t]he transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 *Jefferson Papers* 379 (1961). The first Congress confirmed that the Constitution confers broad foreign-affairs functions on the Executive when it established the Department of Foreign Affairs to perform duties "relative to," among other things, "negotiations with public ministers from foreign States or princes," "memorials or other applications from foreign public ministers," and "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department." Act of July 27, 1789, ch. 4, § 1, 1 Stat. 29.

The Constitution thus establishes the Executive as "the sole organ of the federal government in the field of international relations," with exclusive authority to conduct diplomatic relations. *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936). Recognition—the decision whether to treat an entity as a state or government in the Nation's foreign relations—falls within the core of the President's sole authority over "[t]he transaction of business with foreign nations." 16 *Jefferson Papers* 379.

ii. Particularly relevant to recognition, the Constitution assigns to the President the power to nominate ambassadors, U.S. Const. Art. II, § 2, Cl. 2, and to "make Treaties," *ibid.*

The Constitution gives the President alone the power to nominate an ambassador. U.S. Const. Art. II, § 2, Cl. 2. The nomination decision encompasses the antecedent questions whether to recognize the foreign state and government, and whether to establish diplomatic relations. In nominating the ambassador, the President implements his recognition decision. While the Senate must consent to appointment of the President's nominee, that determination concerns whether or not the President's nominee is suitable for confirmation, and does not extend to the recognition decision already made by the President. See 16 *Jefferson Papers* 378, 379-380 (Senate's confirmation power does not include the power to "judge * * * the necessity which calls for a mission to any particular place"). Even if the Senate withholds consent to a nominee, moreover, the President may effectuate a recognition decision by engaging in diplomatic relations through officials who do not require confirmation. And the President retains the authority not

to appoint an ambassador even after the Senate has given its advice and consent. Nor does the Constitution contemplate any participation by Congress in the Presidential decision to initiate diplomatic relations; Article II's requirement that Congress establish offices by law (§ 2, Cl. 2) does not apply to ambassadors and other public ministers. And no other constitutional power would authorize Congress to establish diplomatic relations with a foreign entity.

Similarly, the President has the power to "make Treaties" with the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. The President has the sole responsibility for negotiating treaties before presenting them to the Senate. See *Curtiss-Wright*, 299 U.S. at 319 ("Into the field of [treaty] negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."). Once the President has completed negotiations, the Senate has the constitutional prerogative to decide whether to consent to ratification. The President, however, retains the ultimate authority to decide whether to ratify and conclude a treaty after the Senate provides its consent. See Restatement (Third) of Foreign Relations Law § 303 cmt. d, at 160 (1987) (Restatement). The President thus has exclusive power to ensure that the United States negotiates and concludes treaties in a manner that fully accords with his recognition policy.

c. The Founding generation understood the Executive's recognition power to include the exclusive authority to decide whether recognition is appropriate

i. Consistent with the contemporaneous understanding and practice at the time of the Founding, the Washington Administration understood the decision

whether to recognize a foreign state or government to require an assessment of whether recognition was appropriate under the circumstances. But cf. Pet. Br. 28. Hamilton thus explained that the Reception Clause "includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not." *Pacificus No. 1*, at 12.

As Secretary of State, Jefferson obtained President Washington's approval to establish a recognition policy under which the Executive would acknowledge a government, whatever its form, after determining that it reflected the "will of the nation" and was "invested with [full] powers by the nation to transact it's affairs." Letter from Jefferson to Morris (Dec. 30, 1792), in 24 *Jefferson Papers* 800 (1990); Notes on the Legitimacy of Government (Dec. 30, 1792), *id.* at 802 (Jefferson "la[id] down" the "principle[s]" that were to govern recognition of newly independent states). That policy thus contemplated that the Executive could refuse to recognize a purported government if the stated criteria were not satisfied.

ii. President Washington's Cabinet also understood the Executive's authority to make recognition decisions to be exclusive of Congress. In 1793, Washington and the Cabinet unanimously decided that the President could receive the French ambassador, thereby recognizing the new government of France, without first consulting Congress.[4] Letter from

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[4] Although petitioner asserts (Br. 36) that Washington "never claimed" that the recognition power was exclusive, his actions in receiving Genet indicate that he believed Congress had no a role in the decision. Petitioner also suggests (Br. 35-36 & n.8) that mem-

Washington to the Cabinet (Apr. 18, 1793), in 25 *Jefferson Papers* 568-569. Hamilton reported that "[n]o objection has been made to the president's having acknowledged the republic of France, by the reception of its minister, without having consulted the senate." *Pacificus No. 1*, at 13-14.

As President, James Madison followed Washington's lead by refusing, without consulting Congress, to receive Luis Onis of Spain on the ground that it was unclear who was "in actual possession" of the government. Letter from Madison to Rodney (Oct. 22, 1809), in 2 *The Papers of James Madison* 26 (1992) (*Madison Papers*); 4 *Memoirs of John Quincy Adams* 206 (1875) (*Memoirs*). Madison later did receive Onis, in 1815, again without consulting Congress, after he asked Secretary of State Monroe to determine "whether on a view of all the facts known to the Dept. of State," including the United States' foreign-relations interests, "it might not be best to receive" Onis. Founders Online, Nat'l Archives, Letter from Madison to Monroe (Apr. 18, 1815), http://founders.archives.gov/documents/Madison/99-01-02-4273.

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bers of the Washington Administration believed that the law of nations compelled Genet's reception. Petitioner proffers no evidence that Jefferson believed the recognition principles he set forth were preexisting law-of-nations rules that the United States was bound to follow. See 24 *Jefferson Papers* 802, *supra*. Genet's reception, moreover, was consistent with Washington's desire to achieve a "stricter connection" with France. Notes of a Conversation with George Washington on French Affairs (Dec. 27, 1792), *id.* at 793. In any event, the Washington Administration's actions reflect its belief that the Executive alone had the authority and institutional ability to make the assessments necessary to determine whether recognition was appropriate. See pp. 20-21, *supra*.

2. Structural and functional considerations confirm that the President's recognition power is exclusive

a. While the Constitution expressly confers recognition authority on the President through the power to receive ambassadors and other foreign-relations powers, the Constitution contains no provision for Congress to make, or even participate in, recognition decisions. See *Story* § 1560, at 417 ("The constitution has expressly invested the executive with power to receive ambassadors, and other ministers. It has not expressly invested congress with the power, either to repudiate, or acknowledge them."). Nor do any of Congress's enumerated powers encompass the recognition power.[5]

The Constitution commits the recognition power to the Executive alone for the same reason it vests most foreign-affairs powers in the Executive. Congress proved institutionally incapable of conducting foreign relations under the Articles of Confederation, and the Framers understood that the Executive's "unity[,] * * * [d]ecision, activity, secrecy, and dispatch" would enable it to react to international events with

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[5] Congress may regulate foreign commerce and the value of foreign currency, U.S. Const. Art. I, § 8, Cls. 3, 5, but that power does not imply any recognition power, as U.S. persons may engage in commerce in foreign lands regardless of those territories' recognition status. Similarly, Congress's power to declare war, *id.* § 8, Cl. 11, does not include recognition authority, as that decision does not turn on the United States' recognition policy toward the belligerent power. And while Congress, in defining and punishing offenses "against the Law of Nations," *id.* § 8, Cl. 10, might choose to make the involvement of a recognized state or government, or one of its officials or nationals, an element of an offense, that does not imply that Congress could determine *which* entities are recognized.

the necessary alacrity and clarity of purpose. *The Federalist No. 70*, at 472 (Hamilton); see *Story* § 1561, at 418 (Branches' relative institutional capabilities "[p]robably" explain Constitution's conferral of recognition power on the Executive without Senate participation); House Members Amicus Br. 17 (functional considerations justify exclusive Executive recognition power).

b. The decision whether to recognize a foreign state or government requires careful judgments about whether the state or government exists and controls particular territory, as well as judgments about whether recognition (or withholding recognition) will serve the United States' foreign-relations interests. The Executive is far better positioned than the Congress to gather and assess the information needed to make those judgments in a timely and decisive manner, as the President "has his confidential sources of information," and "his agents in the form of diplomatic, consular and other officials." *Curtiss-Wright*, 299 U.S. at 320. With its "vast share of responsibility" for conducting foreign relations, only the Executive has the comprehensive understanding of the United States' contemporaneous foreign-relations objectives that is necessary to decide whether—and when—recognition will advance the United States' interest. *Garamendi*, 539 U.S. at 414 (citation omitted).

In addition, the timing of recognition decisions is often critical to steering international events in a direction that advances the Nation's interests. For instance, President Truman recognized Israel minutes after it proclaimed independence, acting quickly to ensure that Israel would have immediate foreign support and that U.S. recognition would precede Soviet

recognition. Michael J. Cohen, *Truman and Israel* 211, 215, 219 (1990). Indeed, the Executive makes numerous and often nuanced decisions related to recognition, including territorial determinations, in response to evolving events and claims of sovereignty—and each decision entails a careful assessment of the national-security and foreign-relations implications of the decision. See pp. 27-30, *infra*. Congress, which can take legally effective action only by passing a law, through bicameral action and presentment to the President, see *INS* v. *Chadha*, 462 U.S. 919, 955-958 (1983), would be unable to exercise the recognition power with the necessary flexibility and dispatch.

Finally, secrecy can be crucial in determining whether to recognize a state or government, as such decisions often are made against the backdrop of conflict or annexation. Public disclosure of deliberations about recognition could exacerbate international tensions and create confusion regarding the United States' position. While the Executive is well-positioned to keep its deliberations secret, Congress is not. See *Curtiss-Wright*, 299 U.S. at 322.

c. Because recognition is a determination that the United States will treat an entity as a state or government in its foreign relations, it is crucial that the Nation speak with one voice. Cf. *Curtiss-Wright*, 299 U.S. at 319-320. That unity would be impossible, however, if the recognition power were shared between Congress and the Executive, as petitioner contends.

When the Executive and Congress share power over a single foreign-affairs decision—*i.e.*, whether to commit the United States to a treaty—the Constitution expressly delineates the Branches' respective roles. See *Curtiss-Wright*, 299 U.S. at 319 (treaty

power preserves Executive's role as sole organ of foreign relations). But the Constitution contains no such apportionment of responsibility for recognition decisions. Treating the recognition power as shared could therefore set the two Branches at cross-purposes, undermining the Nation's ability to make and implement recognition decisions with the necessary speed and clarity.

Under petitioner's position, which in fact appears to be one of congressional supremacy, Congress would have the authority to reverse any Executive recognition decision—whether it reflected (as here) more than six decades of consistent policy, or a recent judgment in response to a rapidly evolving situation—by passing a law. The prospect of friction between the Branches during Congress's deliberations would create international uncertainty about the United States' position. If Congress passed such a bill, the President might veto it, and the Nation's recognition policy would then hinge on whether Congress overrides the veto. In the event of an override, the President would be bound to follow the recognition policy prescribed by Congress. That recognition decision, embodied in a statute, could not be easily altered or reversed, even if subsequent events rendered the decision detrimental to United States' foreign-relations interests. And any repeal—assuming Congress acted at all—might take weeks or months.

Under such a regime, the United States' apparent recognition position could flip back and forth, preventing the Nation from responding to international events with clarity and decisiveness, and leaving foreign sovereigns to guess at where the United States stands. Suppose, for instance, that after President

Truman recognized the State of Israel, Congress considered whether to reverse that decision, thereby throwing the United States' position into doubt even as the first Arab-Israeli war erupted and the United States attempted to facilitate an end to it. Such a situation would be untenable. Nothing in the Constitution suggests the Framers intended such a state of affairs, which would replicate the institutional failings under the Articles of Confederation.

Even congressional action short of outright reversal of the President's recognition decisions could undermine the Nation's ability to convey and implement a coherent recognition policy. Here, for instance, petitioner contends (Br. 64-65) that Section 214(d) does not require the Executive to reverse the Nation's position on Jerusalem's status. But Section 214(d) would indisputably put the Executive in the position of attempting to maintain the Nation's longstanding position of not recognizing any claim of sovereignty over Jerusalem, while at the same time implementing a policy that requires it to present diplomatic documents on behalf of the United States that contradict that position. The result would be not merely to prevent the Nation from speaking with one voice, but to prevent the *Executive itself* from doing so in its conduct of foreign relations.

B. Historical Practice Confirms That The Executive Branch Has Sole Authority Regarding Recognition

More than two hundred years of historical practice confirms what the Constitution's text and structure make clear: The recognition power belongs exclusively to the Executive. See *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("long settled and established practice is a consideration of great weight in a proper

interpretation of constitutional provisions regulating the relationship between Congress and the President") (brackets and internal quotation marks omitted) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

From the Washington Administration to the present, Presidents have asserted the sole authority to recognize a foreign state, its government, and the territorial scope of its sovereignty—and have unilaterally made hundreds of recognition decisions. Petitioner is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition—either by rejecting a President's recognition decision or by making a decision the President was unwilling to make unilaterally. On a few occasions in the nineteenth century, Members of Congress sought to have Congress effect recognition on its own. But those efforts invariably foundered after the Executive and other Members of Congress insisted that the President had sole recognition authority. In addition, in a handful of instances on which petitioner relies (Br. 57), the President for political reasons chose to seek congressional support before effecting recognition—but in each case, the President determined recognition policy, and Congress acted consistently with his views.

1. The Executive has consistently asserted sole authority over recognition, including recognition of territorial boundaries

a. In 1793, without consulting Congress, President Washington recognized the new government of France by officially receiving Genet. See pp. 20-21, *supra*. Since then, the Executive has routinely made hundreds of unilateral recognition decisions. See, *e.g.*,

1 John Bassett Moore, *A Digest of International Law* §§ 27-58, at 72-163 (1906) (*Moore*) (eighteenth- and nineteenth-century decisions); 1 Green Haywood Hackworth, *Digest of International Law* §§ 35-51, at 195-318 (1940) (twentieth-century decisions); 2 Marjorie M. Whiteman, *Digest of International Law* §§ 6-64, at 133-467 (1963) (twentieth-century decisions). For instance, in 1804, the Jefferson Administration instructed the American minister to France to recognize the new government of Napoleon, "when satisfied that the Empire was in possession and control of the governmental power and territory of the nation," by presenting his credentials to the new government. *Moore* § 43, at 122. From 1809 until 1815, President Madison refused to receive the Spanish minister so as to deny recognition. See p. 21, *supra*. In 1824, President Monroe determined that "no message to Congress would be necessary" before recognizing Brazil, because "the power of recognizing foreign Governments was necessarily implied in that of receiving Ambassadors and public Ministers." 6 *Memoirs* 329, 348, 358-359. Since the beginning of the twentieth century, moreover, the President's sole authority has gone entirely unchallenged, even as Presidents have made scores of high-profile recognition decisions, including in the aftermaths of World War I, World War II, and the fall of the Iron Curtain.

The Executive's exercise of unilateral authority continues today. For instance, in March 2014, the White House released a joint statement with Ukraine, stating that the United States "will not recognize Russia's illegal attempt to annex Crimea." *Joint Statement by the United States and Ukraine*, http://www.whitehouse.gov/the-press-office/2014/03/25/joint-statement

-united-states-and-ukraine. Other examples include the 2013 recognition of the Government of Somalia and the 2011 recognition of the state of South Sudan. U.S. Dep't of State, Hillary Rodham Clinton, Sec'y of State, *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting* (Jan. 17, 2013), http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm; Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, *2011 Digest* § 9, at 271, 274.

b. The President's exclusive recognition power has always been understood to include the authority to determine the territorial boundaries of a foreign state. Such judgments are integral to recognition, as one of the criteria of statehood under customary international law is that a state must have "defined territory" (which may be disputed or unsettled in part). Restatement § 201 & cmt. b, at 72-73. Recognition of a state therefore requires the United States to determine its position on the claimed territorial extent of the state's sovereignty (including when the United States' position is that the claim is disputed). See *id.* §§ 202, 203 n.2, at 77, 84; Pet. App. 56a.

The Executive makes decisions about what international boundaries to recognize through an interagency process that is led by the State Department and includes the Department of Defense. Such determinations often have national-security implications. For instance, the Executive must determine the extent to which it recognizes a state's territorial claims to preserve the freedom of movement of the U.S. Armed Forces through air and sea. See U.S. Navy Judge Advocate General's Corps, *Maritime Claims Reference Manual* (2013), http://www.jag.navy.mil/organization/

code_10_mcrm.htm; Under Sec'y of Def. for Policy, Dep't of Def., *Freedom of Navigation Reports*, http://policy.defense.gov/OUSDPOffices/FON.aspx (last visited Sept. 18, 2014). Territorial recognition decisions also may have substantial consequences for U.S. relations with the states involved. The President's refusal to recognize Russia's annexation of Crimea is the most recent example of such a determination.

Weighing the national-security and foreign-relations implications of territorial issues has always been at the core of the historic conception of the recognition power. In 1818, for example, Secretary of State John Quincy Adams explained that the Executive declined to recognize "Buenos Ayres as including the dominion of the whole viceroyalty of the La Plata," because it was unclear that the putative state actually included that territory and recognizing the claim could have adverse foreign-relations consequences. *Moore* § 30, at 77-79. Since then, Presidents have made innumerable such determinations. See, *e.g.*, Diplomatic Relations, Succession, and Continuity of States, *1991-1999 Digest* § 9, at 1146-1147 (borders of Bosnia-Herzegovina, Croatia, and Slovenia).

This Court has also acknowledged that authority to determine territorial boundaries of foreign states is essential to effective exercise of the President's recognition power. In 1838, Justice Story, sitting as Circuit Justice, explained that recognition of a state included determination of its borders. *Williams* v. *Suffolk Ins. Co.*, 29 F. Cas. 1402, 1404 (C.C.D. Mass.) (No. 17,738). This Court affirmed, holding that a determination of territorial sovereignty by the "executive branch of the government" is binding on the "government of the Union." *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.)

415, 420 (1839). This Court has consistently reaffirmed that principle. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 212 (1962); *Kennett* v. *Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852).

2. Congress has acquiesced in the President's sole recognition power

Members of Congress have occasionally proposed bills that would have asserted a congressional role in recognizing foreign states or governments. But the Executive Branch—and some Members of Congress—opposed those efforts, and they ultimately came to nothing.

a. Beginning in 1818, Henry Clay, the Speaker of the House of Representatives, introduced a series of resolutions designed to recognize the independence from Spain of certain South American provinces.[6] See Samuel Flagg Bemis, *The Latin American Policy of the United States* 40-44 (1943); 36 Annals of Cong. 2223 (1820). In 1821, after his previous attempts failed, Clay proposed an amendment to an appropriations bill to fund such ministers as the President "may send" to South American republics. 37 Annals of Cong. 1042, 1071. That amendment was defeated after debates in which several Members argued that the resolution interfered with the President's exclu-

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[6] For example, an 1818 attempt to appropriate funds for diplomatic ministers failed after concerns were expressed about its constitutionality. *E.g.*, 32 Annals of Cong. 1468-1469, 1539. In 1820, the House passed a resolution stating that it was "expedient" to appropriate funds for such ministers as the "President * * * may send" to newly independent South American republics. It received no further action. 36 Annals of Cong. at 2223, 2229-2230; see 37 Annals of Cong. 1048 (1821) (1820 resolution was not intended to entrench on Executive's recognition prerogative).

sive recognition power. *Id.* at 1046-1047, 1055, 1071, 1073-1074, 1077. Clay, stating that he understood the defeat to have been caused by "considerations of form," *id.* at 1081, then introduced a nonbinding resolution that expressed interest in the success of the independence movement, while acknowledging the President's exclusive recognition authority. *Ibid.* That face-saving measure, which expressed readiness to support "the President of the United States, whenever he may deem it expedient to recognise the sovereignty and independence of any of the said provinces," passed the House. *Id.* at 1081-1082, 1091-1092. Petitioner is thus incorrect in suggesting (Br. 43-44) that concerns about intruding on the President's constitutional prerogative had little effect in the congressional debates.

Meanwhile, the Monroe Administration maintained that the Executive possessed sole authority to recognize newly independent states. See 5 *Memoirs* 329 (Administration decided in 1817 that it had exclusive power). Building on Jefferson's recognition policy, Secretary of State John Quincy Adams determined that the United States' interest in avoiding international entanglements would be best served if the President recognized a colony's independence only upon concluding there was virtually no chance that the colonial power could reassert dominion. 4 *The American Secretaries of State and Their Diplomacy* 41-42 (Samuel Flagg Bemis ed., 1958). Accordingly, Adams, without consulting Congress, declined to receive an emissary from Buenos Aires in order to avoid prematurely recognizing the state. 4 *Memoirs* 88, 204-207.

In 1822, President Monroe informed Congress that the Executive had determined that certain South

American republics had achieved independence and that recognition was appropriate. Special Message (Mar. 8, 1822), in 2 *A Compilation of the Messages and Papers of the Presidents 1787-1897*, at 116-118 (1896) (*Messages and Papers*). "Should Congress concur," the President stated, it should appropriate funds for ministers. *Id.* at 118; *id.* at 116 (Branches should cooperate in their "respective rights and duties"). Contrary to petitioner's contention (Br. 42), Monroe's message did not imply that he believed that Congress's appropriation was necessary to effect recognition. See Sen. Hale, *Memorandum upon power to Recognize Independence of a New Foreign State*, 29 Cong. Rec. 663, 675 (1897) (*Hale Memorandum*) (Monroe invoked Executive power to send ministers and recognize governments, and congressional power to provide salary). To the contrary, before Congress passed any appropriations statute, the Secretary of State informed Spain that the United States had recognized the new republics, and informed the Colombian minister that the President would receive him. Letter from Adams to the Minister from Spain (Apr. 6, 1822), in 9 *British and Foreign State Papers 1821-1822*, at 754 (1829); 5 *Memoirs* 495; Act of May 4, 1822, ch. 52, 3 Stat. 678 (appropriating funds "for such missions" as the "President * * * may deem proper").

Petitioner also argues (Br. 44) that Monroe (and subsequent Presidents, *e.g.*, *id.* at 54) applied the law of nations in determining that the republics should be recognized. A recognition decision necessarily entails consideration of whether a newly independent state meets international-law criteria for statehood. See Restatement § 201, at 72. But what matters is that

the Executive consistently asserted, and Congress acquiesced in, exclusive authority to determine whether those criteria were met. The Executive, moreover, imposed additional requirements, including that the fight for independence had to be "manifestly settled" before recognition was appropriate, 2 *Messages and Papers* 117, and, like the Washington and Madison Administrations before it, also considered U.S. foreign-relations interests. See p. 21, *supra*.

b. In 1864, the House passed a proposed joint resolution asserting that acknowledging the Emperor of Mexico would not accord with U.S. policy. Cong. Globe, 38th Cong., 1st Sess. 1408-1409. Concerned that the resolution would provoke France into recognizing the Confederacy, see Julius Goebel, Jr., *The Recognition Policy of the United States* 194-196 (1915), the Secretary of State directed the minister to France to explain that recognition authority is "purely executive." 38th Cong. Globe, 1st Sess. at 2475. Although the House subsequently passed a declaratory resolution asserting congressional recognition authority, Cong. Globe, 38th Cong., 2d Sess. 48 (1865), the Senate did not take up the issue, and the United States' policy remained unchanged. See *Hale Memorandum* 677.

c. In 1896, the Senate considered a joint resolution purporting to recognize "the independence of the Republic of Cuba" from Spain. 29 Cong. Rec. 326, 332 (1896). In response, the Secretary of State asserted that "'[t]he power to recognize the so-called Republic of Cuba as an independent State rests exclusively with the Executive.'" *Congress Powerless*, N.Y. Times, Dec. 19, 1896. The Senate did not act on the resolution. In connection with the ongoing debate over

Cuba, moreover, Senator Hale presented an exhaustive memorandum arguing that the President possessed, and had historically exercised, exclusive recognition power. See *Hale Memorandum* 663-682.

In 1898, President McKinley requested congressional authorization to intervene militarily in Cuba, but he simultaneously informed Congress that "the so-called Cuban Republic" did not yet merit recognition under the principles set forth during the Monroe Administration, and that such recognition was "not necessary * * * to enable the United States to intervene" militarily. Message to Congress (Apr. 11, 1898), in 10 *Messages and Papers* 146 (1899); contra Pet. Br. 54. The House considered a resolution that would have recognized the "republic of Cuba," but voted against it after Members argued that the circumstances did not "justify the executive department of our Government in giving such recognition." 31 Cong. Rec. 3818 (1898). The Senate considered a similar resolution, but several Members expressed doubt about its constitutionality. *Id.* at 3973, 3976, 3991, 3993, 4030; *id.* App. 290. Congress ultimately passed a joint resolution that instead stated that the "people" of Cuba were independent, authorized the President to intervene in Cuba (in what would become the Spanish-American War), and disclaimed an intent to assert dominion over Cuba. J. Res. 24, 30 Stat. 738.

Contrary to petitioner's argument (Br. 55-56), the joint resolution acknowledging the independence of the "people" of Cuba was fully consistent with the President's sole authority to decide not to recognize the Republic of Cuba. The resolution merely expressed the view that the people of Cuba were taking part in a "rebellion" rather than a "treasonable riot,"

31 Cong. Rec. at 3774, and also was likely intended to disavow any U.S. territorial ambitions in Cuba. See Gerald E. Poyo, *"With All, and for the Good of All"* 124 (1989).

d. In 1919, the Senate considered a concurrent resolution "request[ing]" that the President "withdraw * * * the recognition" of the existing government in Mexico. 59 Cong. Rec. 73 (1919). Even though that resolution acknowledged the President's authority over recognition, President Wilson wrote to Congress that the Executive possessed sole recognition authority and the resolution would "constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to the guidance of our foreign affairs." Letter from Wilson to Sen. Fall (Dec. 8, 1919), in S. Doc. No. 285, 66th Cong., 2d Sess. 843D (1920). The Senate dropped the resolution. See *Wilson Rebuffs Senate on Mexico*, N.Y. Times, Dec. 8, 1919.

3. Petitioner's attempt to demonstrate that Congress has exercised recognition power is unavailing

Petitioner cites (Br. 37-41, 45-52) four instances in which, he contends, Congress exercised the recognition power. Contrary to petitioner's arguments, on each occasion Congress's actions were consistent with recognition determinations made by the President.

a. In the early nineteenth century, Congress passed trade statutes that were consistent with the Executive's already-stated position on sovereignty over Haiti.

In 1800, Congress passed a statute suspending "commercial intercourse between the United States and France, and the dependencies thereof," and providing that the "island of Hispaniola shall for pur-

poses of this act be considered as a dependency of the French Republic." Act of Feb. 27, 1800, ch. 10, §§ 1, 7, 2 Stat. 7, 10. That statement tracked President Adams' 1799 proclamation declaring that "St. Domingo"—a name for the whole island that the Executive used interchangeably with "Hispaniola"—should be treated as a French dominion for purposes of an earlier non-intercourse law. A Proclamation (June 26, 1799), in 1 *Messages and Papers* 288-289 (1896). In the Executive's view, France had by treaty gained sovereignty over "the whole of the Island of St. Domingo." Letter from Monroe to Madison (June 3 [ca. July 23], 1795), in 16 *Madison Papers* 38 (1898).

Similarly, an 1806 statute prohibiting trade between the United States and "any part of the island of St. Domingo, not in possession, and under the acknowledged government of France," was consistent with the Executive's position that France retained sovereignty even though Haiti had declared independence and driven the French from portions of the island.[7] Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351; see Letter from Madison to Livingston (Jan. 31, 1804), in 6 *Madison Papers* 410-411 (2002).

b. Congress also acted consistently with the President's stated views in connection with President Jackson's 1837 recognition of Texas's independence from

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[7] *Clark* v. *United States*, 5 F. Cas. 932 (C.C.D. Pa. 1811) (No. 2838), does not support congressional recognition authority. Contra Pet. Br. 40-41. There, the question was whether, as a matter of statutory construction, an 1809 statute criminalizing importation from French territories included St. Domingo. 5 F. Cas. at 931-933. The court's reliance on the 1806 statute as evidence of Congress's intent does not imply any view about whether Congress had recognition power.

Mexico. Contra Pet. Br. 45-49. In 1836, Jackson informed Congress that on "the ground of expediency," he believed Congress should decide when recognition would be appropriate, and that his own view was that recognition should be "suspended" pending a threatened invasion by Mexico. Message (Dec. 21, 1836), in 3 *Messages and Papers* 265-271. He reserved the question of the Executive's exclusive authority. *Ibid.* After the invasion failed, Cong. Globe, 24th Cong., 2d Sess. 33 (1837), Congress appropriated funds for a minister "whenever the President * * * shall deem it expedient." Act of Mar. 3, 1837, ch. 33, 5 Stat. 170. Jackson then appointed a minister. Message (Mar. 3, 1837), in 3 *Messages and Papers* 281-282. Congress thus implemented the recognition policy the President established.

c. In 1862, Congress facilitated President Lincoln's decision to recognize Haiti and Liberia. Contra Pet. Br. 50-52. In light of the political sensitivity of recognizing Haiti and Liberia during the Civil War, Lincoln decided that it would be prudent to enlist congressional support for his recognition decision. Rayford W. Logan, *The Diplomatic Relations of the United States With Haiti 1776-1891*, at 299 (1941). Lincoln informed Congress that he believed the countries should be recognized but was unwilling to inaugurate a "novel policy" in that respect without congressional agreement, and he requested an appropriation for ministers to the "new States." First Annual Message (Dec. 3, 1861), in 6 *Messages and Papers* 47 (1897). After debates in which the bill's sponsor observed that congressional action was unnecessary to permit the President to recognize the republics, Cong. Globe, 37th Cong., 2d Sess. 1773 (1862) (Sen. Sumner), Con-

gress authorized the appointment of diplomatic representatives to Liberia and Haiti. Act of June 5, 1862, ch. 96, 12 Stat. 421.

d. Finally, the Executive did not, as petitioner asserts (Br. 49-50), acknowledge congressional recognition authority in considering whether to recognize Hungary in 1849. During the Hungarian independence movement, the President gave a diplomatic agent the power to recognize Hungary's independence by negotiating a treaty with the new government. Power to Mr. Mann to Negotiate with Hungary (June 18, 1849), in 38 *British and Foreign State Papers 1849-1850*, at 264 (1862). In that context, the Secretary of State's statement that the President would also "recommend" recognition "to Congress," *id.* at 263-264, is best read to suggest that the President would seek congressional support for the recognition decision he had already made. After the revolution failed, the President informed Congress that he would have recognized Hungary had he deemed it warranted "according to the usages and settled principles of this Government." S. Doc. No. 279, 61st Cong., 2d Sess. 2 (1910).

C. This Court And Individual Justices Have Repeatedly Stated That The Constitution Assigns Recognition Authority To The President Alone

1. This Court and individual Justices have many times stated that the Executive has sole authority to make recognition decisions. In 1817, Chief Justice Marshall, sitting as Circuit Justice, held that "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." *United States* v. *Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (No.

15,429). In 1838, Justice Story concluded that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments."[8] *Williams*, 29 F. Cas. at 1404. Later decisions have reaffirmed the point. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *Baker*, 369 U.S. at 212; *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137-138 (1938); *United States* v. *Belmont*, 301 U.S. 324, 330 (1937).

Although these decisions held that the President had "sole" authority to recognize a foreign government, *Belmont*, 301 U.S. at 330, and that such action is "conclusive" on the courts, *Guaranty Trust*, 304 U.S. at 138, they did not specifically address a congressional attempt to constrain the President's recognition power. In light of Congress's historical acquiescence in the Executive's exclusive exercise of that power, however, it is unsurprising that the Court had no occasion to address a dispute between the Branches.

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[8] Petitioner is incorrect in contending (Br. 34) that Justice Story expressed a contrary view in his *Commentaries on the Constitution of the United States*. Story stated that there was "little doubt" that the recognition power "could not properly be conferred" on any Branch other than the Executive. *Story* § 1561, at 417; see pp. 22-23, *supra*. He also noted that "it is said" that Congress may override the President's recognition decision, but he did not endorse that view, describing it as an "abstract" argument "open to discussion." *Story* § 1560, at 416-417. Story was referring to William Rawle's unsupported assertion to that effect. See *id.* at 416 n.1; William Rawle, *A View of the Constitution of the United States of America* 96 (Philip H. Nicklin ed., 2d ed. 1829); contra Pet. Br. 32.

At the same time, it is significant that the Court never suggested a role for Congress in recognizing foreign states or governments.

2. Petitioner contends (Br. 59-60) that "[*d*]*icta* in opinions of this Court" assign the recognition power jointly to the President and to Congress. But the decisions on which petitioner relies did not involve the power to recognize foreign states or governments. Those decisions dealt with the status of territories controlled or acquired by the United States, a matter over which Congress has authority under the Territories Clause of the Constitution. See U.S. Const. Art. IV, § 3, Cl. 2; *Henkin* 72; *Jones* v. *United States*, 137 U.S. 202, 212, 216-217 (1890) ("legislative and executive departments" determined whether islands were "in the possession of the United States"); *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 378, 380-381 (1948); *Boumediene* v. *Bush*, 553 U.S. 723, 753 (2008) (U.S. sovereignty at Guantanamo Bay).[9]

Finally, petitioner also relies (Br. 30-31) on *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818), but that decision is inapposite. There, Chief Justice Marshall—who had concluded in *Hutchings* that recognition decisions were made by the Executive, 26 F. Cas. at 442—stated that in applying the piracy statute to actions that would be acts of war (rather than

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[9] In *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918), a case involving actions by the Mexican government, the Court quoted *Jones* in asserting that the determination of sovereignty "by the legislative and executive departments of any government conclusively binds the judges." *Id.* at 302 (citation omitted). There were no legislative actions at issue, however, as the Court relied on the Executive's unilateral recognition of the Mexican government. *Id.* at 301.

crimes) if committed by agents of a government fighting for independence, the courts "must view such newly constituted government as it is viewed by the legislative and executive departments of the government." 16 U.S. (3 Wheat.) at 643. Because criminal offenses must be defined by statute, *id.* at 634-635, the Court's point was that distinguishing between acts of piracy and acts of war would involve analyzing Congress's intent in enacting the piracy statute, as well as the United States' recognition position. *Palmer* therefore does not suggest that the Court believed Congress shared in the recognition power.

II. SECTION 214(d) UNCONSTITUTIONALLY INTERFERES WITH THE PRESIDENT'S EXCLUSIVE RECOGNITION POWER

Section 214(d) requires the Executive, upon request by individual citizens, to treat Jerusalem as within Israeli sovereignty in issuing U.S. passports, which are official documents addressed to foreign sovereigns. Because passports are diplomatic communications, the Executive has long used its inherent constitutional authority over the content of passports to ensure that their birthplace designations conform to the President's recognition decisions. By reversing that practice with respect to Jerusalem, Section 214(d) infringes the core of the President's exclusive recognition power. Since Israel's founding, every President has adhered to the position that the status of Jerusalem should not be unilaterally determined by any party. Section 214(d) would require the Executive simultaneously to express precisely the opposite position in a subset of the Executive's official communications with foreign sovereigns, and to do so at the behest of individual citizens seeking to express their

personal views on what the Nation's position should be.

Congress's attempt to force the Executive into that Janus-like posture is an unconstitutional impingement on the Executive's recognition power and its conduct of foreign affairs based on that power. The effective exercise of the recognition power—the prerogative to determine and communicate the position of the United States on matters of recognition—turns on the Executive's ability to be the single authoritative voice of the United States' position. A decision by this Court requiring the Executive to implement Section 214(d) would force the Executive to take inconsistent positions in conducting foreign relations on behalf of the United States, thereby undermining the President's credibility and his conduct of sensitive diplomatic efforts.

A. The Executive Has Constitutional Authority To Determine The Content Of Passports As It Relates to Recognition

1. The Executive possesses constitutional authority over passports as instruments of diplomacy

a. A passport, this Court has explained, is an instrument of diplomacy, see *Haig* v. *Agee*, 453 U.S. 280, 292-293 (1981), through which the President, on behalf of the United States, "in effect request[s] foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers," *United States* v. *Laub*, 385 U.S. 475, 481 (1967); J.A. 22 (reproducing petitioner's passport). Thus, although a passport functions on one level as a "travel control document" that provides

"proof of identity and proof of allegiance to the United States," it is also an official communication "by which the Government vouches for the bearer and for his conduct." *Agee*, 453 U.S. at 293; see also *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835).

Because a passport is a document through which the President communicates with foreign sovereigns, the authority to issue passports historically has been understood to flow directly from his inherent constitutional power regarding "the national security and foreign policy of the United States." *Agee*, 453 U.S. at 293. From the time of the Founding, the Executive Branch has issued passports, even though no statute addressed its authority to do so until 1856. See, *e.g.*, U.S. Dep't of State, *The American Passport* 8-21 (1898); *Urtetiqui*, 34 U.S. (9 Pet.) at 699. The Executive also determined the content of those passports insofar as that content relates to the conduct of diplomacy, see *The American Passport* 77-86, an authority that flowed naturally from passports' character as instruments of official communication to other nations.

Congress historically has "endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." *Agee*, 453 U.S. at 294. When Congress enacted the first Passport Act in 1856, it did so to "confirm[] an authority already possessed and exercised by the Secretary of State" and to establish that the Secretary's authority was exclusive of state and local governments. *Id.* at 294-295 & n.27 (citation omitted). Accordingly, the 1856 statute, using "broad and permissive language," *id.* at 294, provided that "the Secretary of State shall be authorized to grant and issue

passports * * * under such rules as the President shall designate." Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 60; see Rev. Stat. § 4075 (1875) (replacing "shall be authorized" with "may").

b. Petitioner misreads this Court's decisions in contending (Br. 22-24) that the Executive may regulate passports only pursuant to congressional authorization. In *Agee*, the Court held that the Secretary of State has broad statutory authority to revoke passports on national-security grounds. 453 U.S. at 295, 297-298. The Court relied on passports' diplomatic character, the historical understanding that the Executive's passport authority arose directly from the Constitution, and the Executive's unique expertise in the foreign-relations arena. *Ibid.* Those same considerations equally support the conclusion that the Executive exercises inherent constitutional authority to use passports as instruments of foreign policy, but in light of its statutory holding, the Court had no occasion to reach that question. *Id.* at 289 n.17. Similarly, in *Zemel* v. *Rusk*, 381 U.S. 1, 3 (1965), the Court held that the Executive Branch had statutory authority to refuse to validate certain passports on national-security grounds, without addressing the extent of the Executive's constitutional authority.

2. Any passport legislation must be in furtherance of Congress's enumerated powers, and may not interfere with the Executive's recognition determinations

a. Although Article I of the Constitution does not expressly confer any "passport power" on Congress, that body has the authority to regulate passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce. But because a passport is a diplomatic document, and the

Executive Branch has long exercised constitutional authority to determine the content of passports insofar as it pertains to the conduct of diplomacy, separation-of-powers principles prohibit Congress from exercising its authority over the content of passports in a manner that interferes with the President's exclusive authority.

That conclusion is reinforced by Congress's historic acknowledgment of the Executive's broad authority over the content and use of passports. See pp. 44-45, *supra*. The current Passports Act continues that tradition, as it provides that the Secretary of State "may grant and issue passports * * * under such rules as the President shall designate and prescribe." 22 U.S.C. 211a; see 22 C.F.R. 51.1-51.74; 7 FAM 1300 (2014).

b. The relatively few statutes that Congress has passed governing passports demonstrate the extent to which Congress has left the content of passports, and their use as instruments of diplomacy, to the Executive. Those statutes also demonstrate how radically Section 214(d) departs from the traditional realm of passport legislation.

For example, Congress has exercised its powers over foreign commerce and border control to enact statutes requiring passports for certain travel or limiting particular persons' travel, as well as prohibitions on application fraud and passport tampering. See, *e.g.*, 8 U.S.C. 1185(b); 22 U.S.C. 212a, 2714; 42 U.S.C. 652(k); 8 U.S.C. 1365b, 1504, 1732; 18 U.S.C. 1542-1544. Congress has also regulated the issuance of passports to aliens abroad and the use of passports as proof of citizenship, in aid of its control over immigration and naturalization. 22 U.S.C. 212, 2705, 2721.

None of those statutes purports to regulate passports' content, much less the Executive's authority to determine that content as it relates to the United States' foreign-relations interests.

Congress has also enacted passport legislation that assists the Executive in implementing its authority over passports. See U.S. Const. Art. I, § 8, Cl. 14. For instance, Congress has prohibited passport issuance by anyone but the Secretary of State, 22 U.S.C. 211a, and it has also regulated fees, 22 U.S.C. 214, 214a; 10 U.S.C. 2602, and time limits, 22 U.S.C. 217a.[10]

In vivid contrast to those statutes, Section 214(d) purports to regulate passport content by requiring the Executive, upon request, to designate "Israel" as the birthplace of U.S. citizens born in Jerusalem. In enacting Section 214(d), Congress did not suggest, as the Senate now does in its amicus brief (at 2), that the provision was necessary and proper to further Congress's powers over foreign commerce and naturalization. Rather, Section 214(d) is part of a section entitled "United States policy with respect to Jerusalem as the capital of Israel," a title that petitioner concedes "sounds more in foreign policy than in passport regulation." Pet. Br. 19. Even accepting the contention (Senate Amicus Br. 25) that, despite its title, Section 214(d) seeks only to facilitate "self-

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[10] On the rare occasion when Congress attempted to regulate issuance of diplomatic passports in a manner that interfered with the President's exclusive authority to conduct diplomacy, the Executive declined to enforce the provisions. See, *e.g.*, George H.W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993*, 1991 Pub. Papers 1344-1345 (Oct. 28, 1991); *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 22 (1992).

identification" of U.S. citizens (but see p. 56, *infra*), it is difficult to discern even an attenuated connection between that purpose and naturalization (*i.e.*, setting the conditions on which individuals may become citizens) or foreign commerce (*i.e.*, controlling travel or entry). Section 214(d) bears so little resemblance to the passport regulations Congress has traditionally enacted that it can fairly be characterized as "passport legislation" (Pet. Br. 19) only in the sense that it uses passports as a vehicle to achieve a recognition-related objective.

B. Section 214(d) Unconstitutionally Forces The Executive To Communicate To Foreign Sovereigns That The United States Views Israel As Exercising Sovereignty Over Jerusalem

By requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns, Section 214(d) unconstitutionally encroaches on the President's core recognition authority. See, *e.g.*, *Chadha*, 462 U.S. at 946-948; *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976); *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1871).

1. The place-of-birth designation on passports and reports of birth abroad implements the Executive's recognition policy

In order to implement its recognition policy regarding Jerusalem, the Executive Branch takes care to ensure that its communications with foreign sovereigns and other public statements express a consistent message: The United States does not recognize any sovereignty, including Israeli sovereignty, over Jerusalem. The State Department's policy of listing "Je-

rusalem," not "Israel," as the birthplace in passports and reports of birth abroad for U.S. citizens born in Jerusalem is one expression of the United States' recognition policy. J.A. 49-50. It is also an exercise of the President's constitutional authority to determine the content of passports insofar as that content pertains to his conduct of diplomacy.[11]

a. To be sure, the primary function of the place-of-birth entry on a passport is to assist in identifying the passport holder and to distinguish the individual from other persons having similar names. J.A. 70, 78. But the decision as to how to describe the place of birth—*i.e.*, to list a particular country name, or to designate a particular city or region as being within a country—necessarily operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area. By its nature, a passport is not a document that expresses the views of its bearer on matters of recognition. It is a document that expresses the official position of the United States.

Accordingly, the State Department has long maintained rules that align place-of-birth designations with U.S. recognition policies. See generally J.A. 109-149 (7 FAM 1383). Such designations have been included in U.S. passports since the early twentieth century. J.A. 202. When individuals have protested the country

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[11] Petitioner has not raised separate arguments concerning reports of birth abroad. Pet. App. 10a n.3. Regardless, reports of birth abroad are official documents intended to serve as proof of nationality for foreign and domestic audiences, including foreign government officials. The designation of a birthplace on a report of birth is an implementation of the recognition power insofar as it identifies, on an official document, which foreign state (if any) has sovereignty over that place.

listed on their passports—particularly when boundaries shifted after World War II—the Department has uniformly explained that its policy is to ensure that the birthplace designation is consistent with the present "sovereignty recognized by our Government." J.A. 204, 207-209 (citation omitted). That policy continues in force today: While the Department generally lists the "country of the applicant's birth" in passports, the Department will refrain from designating a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. The State Department accordingly maintains detailed rules governing place-of-birth designations. J.A. 109-149. The designation of "Jerusalem" in passports and consular reports of birth abroad is a specific—and particularly sensitive—application of the Executive's foreign-policy and recognition decisions.

b. Petitioner's arguments (Br. 21-22, 25-26) that the State Department's place-of-birth rules do not implement recognition policy are unavailing.

Petitioner first argues (Br. 25) that the FAM permits the listing of localities that are not sovereignties. That is beside the point. The Department's policy does not require a recognized sovereign to be listed; rather, it simply prohibits listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. Thus, a "city or area" may be listed in cases of disputed territory.[12] *Ibid.*

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[12] Petitioner misunderstands (Br. 25) the rule permitting U.S. citizens born before May 1948 to designate "Palestine" as their birthplace. That policy is a limited exception to the general rule of listing only "the country having present sovereignty." J.A. 112.

Petitioner also challenges the State Department's policy of giving citizens some flexibility to choose to have the Department list a city rather than the state with recognized sovereignty. J.A. 114. By listing only a city, the Department *avoids* taking a position on sovereignty. Contrary to petitioner's argument (Br. 26), that practice of accommodation applies neutrally to all U.S. citizens born abroad, whether they are supporters of Israel born in the Golan Heights, J.A. 112, supporters of the Palestinian people born in Haifa, J.A. 114, or Catalan-independence supporters born in Barcelona, *ibid.*

Finally, contrary to petitioner's arguments (Br. 21-22), the State Department's policy regarding the designation of Taiwan as a birthplace is fully consistent with the Executive's general position on birthplace designations. In 1994, Congress provided for the Department to permit U.S. citizens born on Taiwan to request that "Taiwan" be recorded as their birthplace rather than "China." See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 395, as amended by Act of Oct. 25, 1994, Pub. L. No. 103-415, § 1(r), 108 Stat. 4302. The United States recognizes the People's Republic of China as the sole legal government of China, but it merely acknowledges the Chinese position that there is only one China and that Taiwan is part of China. J.A. 154. Because the United States does not take a position on the latter issue, the Department concluded that listing either "Taiwan" or "China" would convey a message consistent with the President's recognition policy—either option involves a

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Designating "Palestine" thus does not express a position on currently recognized states or boundaries.

geographic description, not an assertion that Taiwan is or is not part of sovereign China. Here, by contrast, the State Department has concluded that designating "Israel" as the place of birth would directly conflict with the United States' refusal to recognize Israeli sovereignty over Jerusalem. The Department's decisions concerning Jerusalem and Taiwan demonstrate the fact-specific foreign-policy judgments that the Department must make in ensuring that passports are consistent with the President's recognition policy. See, *e.g.*, *Regan* v. *Wald*, 468 U.S. 222, 242-243 (1984).

2. Section 214(d) unconstitutionally interferes with the Executive's core recognition power

a. Section 214(d) requires the Executive to alter its official passport policy with respect to Jerusalem. Its enforcement would result in the Executive's issuing passports acknowledging Israel's sovereignty over Jerusalem.

That message would arise not simply from the individual passports themselves, but from the context of the Executive's passport policy and Section 214. Foreign sovereigns (and other foreign and domestic audiences) understand that the United States does not identify a state as a birthplace on passports unless doing so is consistent with U.S. recognition policy. See J.A. 88, 228-229. Foreign sovereigns would also be aware that the Executive is designating "Israel" pursuant to a statute whose explicit purpose is to express "United States policy with respect to Jerusalem as the capital of Israel." § 214, 116 Stat. 1365 (capitalization altered). Section 214's other subsections reinforce the point, as they require the President to take other steps—relocating the U.S. embassy and memorializing Jerusalem's asserted status in

official documents—that would connote recognition of Jerusalem as Israel's capital. § 214(a), (b), (c), 116 Stat. 1365-1366. And the legislative history reiterates that Section 214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." See H.R. Conf. Rep. No. 671, 107th Cong., 2d Sess. 123 (2002).

For those reasons, the Executive has determined that complying with Section 214(d) would communicate that the United States has "prejudg[ed]" Jerusalem's status and reversed its decades-long policy of not taking any official action that could be perceived as constituting recognition of Israeli sovereignty over Jerusalem. J.A. 55-56. That conclusion is a foreign-relations judgment entitled to substantial deference. See, *e.g.*, *Regan*, 468 U.S. at 242-243; *Curtiss-Wright*, 299 U.S. at 319. It is also indisputable, as the reaction that ensued when Section 214 was enacted demonstrates. See J.A. 57-58 (Palestinian officials condemned Section 214 as "undervaluing" Palestinian and Arab "rights in Jerusalem") (citation omitted); J.A. 230-234.

By forcing the Executive to communicate in official governmental documents that Israel has sovereignty over Jerusalem, Section 214(d) infringes the President's core recognition power. The President's exclusive authority to decide the United States' recognition policy would be greatly undermined if Congress, disagreeing with that policy, could force the Executive Branch to make official statements in foreign-relations that are inconsistent with the Executive's determinations. Other sovereigns would be unable to rely on the President's assurances, which would prevent the Executive from using its recognition position

to advance U.S. foreign-relations interests. There are few contexts in which the President's role as the "sole organ" of the Nation in foreign affairs is more crucial. *Curtiss-Wright*, 299 U.S. at 319-320.[13]

These consequences would be particularly severe in the extraordinarily sensitive context of this case. The United States' position on Jerusalem has always been a crucial principle undergirding U.S. foreign policy in the region, and since 1948 each President has taken care to articulate that position clearly and precisely. See pp. 2-4, *supra*. Section 214 has already damaged the President's ability to convey his position on Jerusalem, as many in the Arab world discounted President Bush's assurances, in his signing statement, that U.S. policy had not changed. J.A. 231-234. Doubt that the United States remains committed to negotiations on Jerusalem's status would only deepen if this Court were to require the Executive to implement Section 214(d) and begin asserting in official documents that Jerusalem is under Israeli sovereignty. Because U.S. policy toward Jerusalem is inextricably linked to this Nation's broader foreign policy in the region, confusion about the President's recognition position could undermine the United States' credibility with the parties to the peace process. Compliance with Section 214(d) also "could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments,

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[13] Contrary to the Senate's argument (Br. 28-30), the fact that Section 214(d) does not also purport to prescribe certain domestic consequences customarily associated with recognition (such as the judicial treatment of Jerusalem) is irrelevant. Section 214(d) directly interferes with the President's ability to convey and implement his policy on the international stage.

adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." J.A. 59.

Because Section 214(d) interferes with the President's core recognition power, it is unconstitutional. Amici House Members argue, however, that Section 214(d) should be held invalid only if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and there is no "overriding need" to promote objectives within Congress's authority. House Members Amicus Br. 21-22 (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)). But "where the Constitution by explicit text commits the power at issue to the exclusive control of the President," the Court has "refused to tolerate any intrusion by the Legislative Branch." *Public Citizen* v. *DOJ*, 491 U.S. 440, 485, 486-487 (1989) (Kennedy, J., concurring in the judgment); see also *Chadha*, 462 U.S. at 945; *Morrison* v. *Olson*, 487 U.S. 654, 711-712 (1988) (Scalia, J., dissenting). In any event, Section 214(d) does prevent the Executive from accomplishing its constitutionally assigned function of establishing recognition policy concerning Jerusalem. And petitioner and his amici have not identified anything close to an "overriding need" to permit private citizens, who have no individual rights in the conduct of the Nation's foreign relations, see *Kennett*, 55 U.S. (14 How.) at 49-50, to use the birthplace designation on their passports to express their personal views, at the expense of the Nation's established policy. Indeed, because Section 214(d) gives private citizens an option, it would not even establish a uniform rule in its sphere of operation.

b. Petitioner's and amici's remaining arguments that Section 214(d) does not interfere with the President's recognition power lack merit.

Petitioner, joined by the Senate and House Members as amici, argues that Section 214(d) merely permits individuals to "identify themselves as born in 'Israel.'" Pet. Br. 16; House Members Amicus Br. 25; Senate Amicus Br. 21. Section 214's text and operation refute that argument. The statute's express purpose is to establish "United States policy with respect to Jerusalem as the capital of Israel." See pp. 47-48, *supra*. And Section 214(d)'s one-sided operation—it does not permit Palestinian-Americans born in Jerusalem after 1948 to self-identify as being born in "Palestine"—is inconsistent with fostering "self-identification." In any event, even if Section 214(d) had a "self-identification" component, it is one that requires public endorsement by the Executive—in official documents.

Petitioner also contends (Br. 19) that constitutional-avoidance principles support disregarding Section 214's title and its other subsections. Those principles are inapposite here. There is no dispute that Section 214(d) would require the Executive, upon request, to designate "Israel" in the passports and reports of birth abroad of U.S. citizens born in Jerusalem. The question in this case is whether that mandate impermissibly interferes with the President's exclusive recognition power. Cf. *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2598 (2012). The answer to that question would be "yes" even if Section 214 had a more innocuous title. The title exacerbates Section 214(d)'s unconstitutional effect by confirming to the world that Congress intended to require the

Executive to take steps in furtherance of recognizing Jerusalem as the capital of Israel.

Petitioner next contends (Br. 63) that implementation of Section 214(d) would have "negligible" foreign policy consequences. The President's recognition power, however, does not depend on a showing that a particular recognition determination is necessary to avoid adverse foreign-relations consequences. In any event, the Executive has determined, exercising its expertise as the Branch responsible for diplomacy, that deviating from longstanding passport practice would have severe adverse foreign-relations consequences.[14] J.A. 53. That judgment is entitled to substantial deference. See *Regan*, 468 U.S. at 242-243.

Relatedly, petitioner argues (Br. 17) that any harm to the United States' foreign-relations interests would be the result of "misperception" by the Arab world, which could be mitigated by American reassurances. But anger and confusion among foreign entities would be the direct result of Section 214(d)'s requirement that the Executive contradict its recognition position —not mere "misperceptions." Simply reaffirming the President's recognition policy—while being compelled to implement Section 214(d)—is no remedy. Section 214(d)'s mandate makes the Executive's reaffirmance of its longstanding Jerusalem policy less credible and therefore less likely to be effective. J.A. 232-234. That is precisely why it is unconstitutional.

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[14] Petitioner maintains that no adverse consequences have followed when State Department officials have occasionally mistakenly listed "Israel" in passports of U.S. citizens born in Jerusalem. Pet. Br. 65 n.14; see Zionist Org. of Am. Amicus Br. 4-26. That is because they are clerical errors, and can be explained as such and quickly corrected.

Finally, petitioner argues (Br. 62), relying on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, that Section 214(d) is constitutional because the President's power is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637-638. But as Justice Jackson explained, Congress may not act upon a subject that the Constitution commits exclusively to the President. *Ibid.* Congress, moreover, lacks any enumerated powers over recognition. In such situations, the President may rely on his "exclusive power" notwithstanding Congress's contrary views. *Id.* at 638 n.4.

c. Contrary to the amici House Members' argument (Br. 4-5), holding Section 214(d) unconstitutional would not suggest that Congress's proper exercise of its enumerated powers cannot touch on subjects that relate to recognition.

Congress has unquestioned authority to legislate on certain matters affecting foreign affairs, including in ways that may bear a relation to recognition, so long as such statutes do not impermissibly interfere with the Executive's recognition power. Thus, for example, Congress has enacted immigration laws that acknowledge the Executive's recognition authority, see, *e.g.*, 8 U.S.C. 1152(d); criminal offenses that apply regardless of recognition, *e.g.*, 18 U.S.C. 1116(b)(2); spending statutes that limit assistance to particular foreign entities without taking a position on recognition, House Members Amicus Br. 10; and tariff statutes that do not take a position on recognition, including one that permits the President to extend duty-free treatment to goods originating in the West Bank or Gaza Strip, see Pub. L. No. 104-234, § 1, 110 Stat.

3058. Finally, at the Executive's urging, Congress enacted the Taiwan Relations Act in the wake of the President's recognition of the People's Republic of China. Pub. L. No. 96-8, 93 Stat. 14 (22 U.S.C. 3301 *et seq.*). That statute confirms the United States' unofficial relationship with Taiwan, including by providing that the "absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan." 22 U.S.C. 3303(a). That statute does not purport to prescribe any recognition policy concerning Taiwan, and it is consistent with the Executive's existing treatment of Taiwan.

Unlike those statutes, Section 214(d) directly infringes the President's core recognition power, threatening to provoke grave foreign-relations consequences and undermine the Executive's ability to facilitate peace negotiations.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. II, Section 1, Cl. 1 provides in relevant part:

The executive Power shall be vested in a President of the United States of America.

2. U.S. Const. Art. II, Section 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. U.S. Const. Art. II, Section 3 provides:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take

Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

4. Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, provides:

UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL.

(a) Congressional Statement of Policy.—The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995 (Public Law 104-45; 109 Stat. 398), to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.

(b) Limitation on Use of Funds for Consulate in Jerusalem.—None of the funds authorized to be appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.

(c) Limitation on Use of Funds for Publications.—None of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.

(d) Record of Place of Birth as Israel for Passport Purposes.—For purposes of the registration of birth,

certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

REPLY BRIEF

Supreme Court, U.S.
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No. 13-628

In The

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z.
and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF

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No. 13-628

IN THE
SUPREME COURT OF THE UNITED STATES

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITIONER'S REPLY BRIEF

INTRODUCTION

Justice Holmes said more than 85 years ago that invalidating an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). This Court has quoted and reaffirmed that proposition in recent Terms. *Shelby County, Alabama v. Holder*, 133 S.Ct. 2612, 2631 (2013); *National*

Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

The Solicitor General is now asking this Court to take the extraordinary step of nullifying an overwhelming vote of the Congress on a subject of frequent legislation (passport administration) in order to secure against "interference" an asserted Presidential power (recognition of foreign sovereigns) that is not explicitly enumerated in the Constitution but over which the Executive Branch now claims "exclusive" control. The Solicitor General's argument rests on a faulty recitation of history and, if sustained, could have a disastrous effect on the balance of powers between Congress and the President in the realm of foreign affairs.

Most of the Solicitor General's brief presents the Executive Branch view of the history of the "recognition power" – a view that is fundamentally wrong. Although our primary contention is that the designation of a birthplace on a passport does not implicate recognition, we first address the claim that the President has "exclusive" authority to recognize foreign sovereigns because the court below apparently believed that this constitutional issue was dispositive.

ARGUMENT

I.

HISTORY REFUTES THE CLAIM THAT THE PRESIDENT HAS EXCLUSIVE RECOGNITION AUTHORITY

The Solicitor General contends that the "Reception Clause" of Article II of the Constitution,

which assigns to the President the duty to "receive Ambassadors and other public Ministers," confers on the Executive Branch "sole power to decide whether and with which states to establish diplomatic relations . . . ." Brief for the Respondent (hereinafter "SG Br.") 9-10. We noted in our principal brief that the Reception Clause is not an enumerated "power" of the Executive Branch. Professor Henkin observed that it "seems a function, an assigned duty, a ceremony that in many countries is performed by a figurehead" (Louis Henkin, *Foreign Affairs and the United States Constitution* 38 (2d ed. 1996)) rather than a delegation of authority, and Alexander Hamilton's initial opinion was that it was "more a matter of dignity than of authority." *Federalist No. 69* at 360 (Gideon ed., 2001).

The court below accepted the faulty historical survey provided to it by the Executive Branch and held that "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." 725 F.3d at 207. In fact, the exercise of the "recognition power" has, contrary to representations made to the court below and to this Court, been a subject of frequent disagreement between the Executive and Legislative Branches.

We have detailed in our principal brief instances in which Congress disagreed with or challenged an Executive Branch recognition decision, or effectively made its own pronouncement recognizing a foreign sovereign. Brief for the Petitioner (hereinafter "Pet. Br.") 34-57. A survey of times when the President and the Congress disagreed on their roles in the recognition process also appears at pages 6-24 of in

the *amicus curiae* brief of the American Jewish Committee. This history refutes the Solicitor General's expansive declarations that "the Executive has consistently asserted sole authority over recognition" (SG Br. 27) and that "Congress has acquiesced in the President's sole recognition power" (SG Br. 31).

On the subject of recognizing foreign sovereigns, William Rawle observed in his early treatise on the Constitution that "the act of the executive is binding" unless the legislature, possessing a "superior power," proceeds to "declare its dissent from the executive recognition or refusal." Pet. Br. 32. Justice Story, in his later treatise on the Constitution, also wrote that the President's recognition decision "is conclusive upon the nation, unless indeed it can be reversed by an act of congress repudiating it." Pet. Br. 33. Hence neither of the leading early constitutional scholars believed that the President had "sole" or "exclusive" power to recognize foreign sovereigns.

A. The Executive Has Not "Consistently Asserted Sole Authority Over Recognition."

When President Monroe asked his Cabinet in 1817 whether he had "power to acknowledge the independence of new States" (Pet. Br. 41) and when President Jackson voiced his doubts in his 1836 message to Congress regarding "the power of initially recognizing a new State" (which he described as "equivalent under some circumstances to a declaration of war") (Pet. Br. 46-47) these two early Presidents were surely not asserting "sole authority over recognition." They expressed

significant doubt whether they had authority, much less "sole authority," over recognition. Nor did President Taylor's Secretary of State – who wrote that the President would "recommend to Congress at their next session" that Hungary be recognized (Pet. Br. 49) – apparently believe that the President had "sole authority over recognition."[1]

B. Congress Has Not "Acquiesced in the President's Sole Recognition Power."

The many instances of Congressional involvement in the recognition process during the Adams, Jefferson, Monroe, Jackson, Taylor, Lincoln, and McKinley Administrations that appear at pages 33-56 and in the Table on page 57 of our principal brief definitively demonstrate that Congress has not "acquiesced" to a regime under which the President enjoys exclusive and unfettered "sole recognition power."

To be sure, there were individuals – such as John Quincy Adams as Secretary of State in the Monroe Administration[2] and some members of Congress –

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[1] In his brief (p. 39) the Solicitor General significantly distorts the word "recommend" by declaring that it "is best read to suggest that the President would seek congressional support for the recognition decision he had already made." Apart from the corruption of the plain meaning of a commonly used English word, the Solicitor General's proposed interpretation does not explain why "congressional support" would have been needed or desired if Presidents had, as the Solicitor General declares, "consistently asserted sole authority over recognition."

[2] The Solicitor General's brief (pp. 21, 28, 32, 33) repeatedly cites Adams' *Memoirs* to support its position without noting that the opinion he expressed was Adams' individual view, apparently not shared by President Monroe.

who believed that the President had exclusive recognition authority. But many others disagreed. An 1862 statute explicitly recognized Haiti and Liberia as independent republics (Act of Jun. 5, 1862, ch. 96, 12 Stat. 421), and the statements of Congressmen Gooch and Eliot and Senator Davis (quoted at Pet. Br. 51-52) expressed the opinion of many in Congress that Congress could independently grant recognition to a foreign sovereign.[3] The House of Representatives' 1865 resolution declaring Congress' "Constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States" including the recognition of new governments (Pet. Br. 53) is acknowledged in the Solicitor General's brief as "a declaratory resolution asserting congressional recognition authority." SG Br. 34. It would not have been approved if, as the Solicitor General asserts, "Congress acquiesced in the President's sole recognition power." Nor would the 1898 Congress have adopted a joint resolution (Pet. Br. 54-55) that formally recognized "the independence of the people of Cuba" – over the objections of President McKinley and his supporters who maintained that the President had exclusive recognition authority – if, as the Solicitor General asserts, "Congress acquiesced in the President's sole recognition power."

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[3] The Solicitor General's brief shrinks Congress' plenary recognition of Haiti and Liberia into mere "facilitation" of President Lincoln's decision to recognize Haiti and Liberia. SG Br. 38. The tenor of the statements made on the floor of Congress refutes this characterization. Supporters of the legislation were not approving a Presidential recognition decision; they were endorsing Congress' independent resolution recognizing the sovereignty of Haiti and Liberia.

The Solicitor General contends that the word "people" was deliberately employed in the 1898 joint resolution because Congress was acknowledging that it could not recognize the independence of Cuba. SG Br. 35-36. The court below accepted this argument (725 F.3d at 209-210), but it squarely contradicts the first sentence of the joint resolution which stated that it was passed "for the ***recognition*** of the independence of the people of Cuba." 30 Stat. 738 (emphasis added). Moreover, the word "people" is not, as the Solicitor General interprets it, a limiting term. The treaty of peace with Japan after World War II provides: "The Allied Powers recognize the full sovereignty ***of the Japanese people*** over Japan and its territorial waters." Treaty of Peace with Japan, 8 Sept. 1951, 3 UST 3169, 136 UNTS 45 (emphasis added).

C. Recognition Precedes, and Is Not Contemporaneous With, Receipt of a Foreign Ambassador.

The Solicitor General's brief asserts that the authority to receive a foreign sovereign's ambassador "necessarily includes the power to decide which ambassadors the President will receive, and therefore the power to decide whether to establish diplomatic relations with a foreign entity." SG Br. 13-14.

The most universally accepted and authoritative guide to diplomatic practice declares, however, that recognition of a new government is not contemporaneous with the establishment of diplomatic relations with that government. Recognition of a new government and the receipt of

an ambassador are the first two of "three distinct steps" that do not necessarily occur simultaneously. Ernest Mason Satow, *A Guide to Diplomatic Practice* 71 (Ivor Roberts ed., 6th ed. 2009).

This was well understood by the founding generation. Great Britain recognized American independence in Article I of the 1783 Treaty of Peace signed in Paris on September 3, 1783. (Definitive Treaty of Peace, Sept. 3, 1783, 8 Stat. 80.) But King George III did not receive John Adams as the United States' minister until June 1785. (George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776*, p. 38 (2008)). France recognized American independence in Article II of the treaties of February 6, 1778 (Treaty of Alliance, Feb. 6, 1778, 8 Stat. 6), but American diplomats were first received by Louis XVI on March 20, 1778. Charles E. Hill, 1 *Leading American Treaties* 19 (1922).

Although the official act of "receiv[ing] Ambassadors and other public Ministers" necessarily follows and is conclusive evidence of the recognition of the government that dispatches the ambassador, the President's conduct in receiving an ambassador does not, in and of itself, constitute the formal act of recognition. Pursuant to the Reception Clause the President, as head of state, formally receives the ambassador of a recognized government, but the Constitution does not specify which branch of government exercises the power to recognize.

In the period preceding adoption of the U.S. Constitution, European countries formally recognized the United States by legislation (the Netherlands), by treaty (France, Great Britain,

Sweden, Prussia, and Morocco), and by the exchange of diplomats (Spain). Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 820-838 (2011). It is, therefore, wrong to equate the function of receiving ambassadors, which the Constitution has assigned to the Executive, with any power – much less an "exclusive" power – to recognize foreign sovereigns.

D. The Solicitor General's Recitation of History Is Erroneous.

(1) **President Washington and Genet** – The Solicitor General's brief relies heavily on its account of the Washington Administration's reception of Edmond Genet. SG Br. 14-16, 19-21. The Solicitor General asserts that Washington's receipt of Genet without consultation with Congress proves that the Washington Administration believed that the President has exclusive recognition authority. SG Br. 20-21, n.4. The Solicitor General chides us for offering "no evidence" that law-of-nations rules, rather than the exercise of exclusive recognition power, governed Washington's decision to receive Genet.

There is compelling evidence, however, that Washington's cabinet believed that the law of nations mandated Genet's reception, and that the President was told he lacked discretion to reject Genet. Washington's Attorney General Edmund Randolph advised the President that the United States was legally required under the law of nations

to receive Genet without qualification.[4] Chief Justice John Jay also advised Alexander Hamilton that the United States had a duty under the law of nations to recognize the French revolutionary government and to receive its designated ambassador.[5] Hamilton had initially opposed receiving Genet but voted in favor after receiving Jay's message. Explicitly invoking the "Laws of nations," Jay drafted a Neutrality Proclamation that declared that "they who a[ctually] administer the government of any nation, are by foreign nation [to] be regarded as its lawful Rulers."

The reception of Genet was a ministerial act performed on May 18, 1793, ***after*** the United States minister to France was instructed by Secretary of State Jefferson on December 30, 1792, and again on March 12, 1793 (following the execution of Louis XVI), to recognize the National Convention. Under the law of nations as interpreted by Emmerich de Vattel, refusing to receive Genet would (utilizing the Vattel language quoted by the Solicitor General (SG Br. 16)) "contest . . . the . . . sovereign dignity" of France.

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[4] Letter from Edmund Randolph to George Washington (May 6, 1793) in 12 The Papers of George Washington, Presidential Series 534, 537-538 (Christine Sternberg Patrick & John C. Pinheiro eds. 2005); see also Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 416 (2012).

[5] Letter from John Jay to Alexander Hamilton (April 11, 1793), in 14 The Papers of Alexander Hamilton 307-31 (Harold C. Syrett ed. 1969); see also Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temple L. Rev. 1, 12 (2013).

(2) President Adams' 1799 Proclamation – The Solicitor General's brief also mis-describes a 1799 proclamation by President John Adams when it states that, pursuant to the Presidential proclamation, the "whole island" of Hispaniola was to "be treated as a French dominion for purposes of an earlier non-intercourse law." SG Br. 36-37.[6] Adams' proclamation did not, in fact, cover the entire island. It opened only two ports within the French territory of St. Domingue (Cape Francois and Port Republican) to trade because they were controlled by Louverture.[7] No ports in the disputed territory of Santo Domingo were opened to trade by Adams' proclamation. The statute Congress subsequently enacted in 1800 was the first formal recognition by the United States that "the ***whole*** of the island of Hispaniola" was to be considered "a dependency of the French Republic." Act of Feb. 27, 1800, ch. 10, 2 Stat. 7. See Pet. Br. 38-39; Robert J. Reinstein, *Slavery, Executive Power and International Law*, 53 Am. J. Legal Hist. 141, 168-169 & n. 135 (emphasis added). This was, as we described it in our principal brief, "a unilateral Congressional recognition of a foreign sovereign." Pet. Br. 39.

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[6] The text of the proclamation appears as Appendix I to this Reply Brief. John Adams, "Proclamation 10 - Suspending, as to St. Domingo, the Restraints of the Act of 1799," June 26, 1799, Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www. presidency.ucsb. edu/ws/?pid=65677

[7] Proof that the Adams proclamation dealt only with two ports and not with the entire island is that passage from the two specified ports to certain others on the island was permissible under paragraph 3 of the Proclamation only if approved by "the government of Santo Domingo" – *i.e.*, by Louverture.

(3) Justice Washington's *Clark* Decision – The Solicitor General's brief wishes away Justice Bushrod Washington's explicit reliance on Congress' 1806 law recognizing French sovereignty over Haiti in *Clark v. United States*, 5 F. Cas. 932, 934 (C.C.D. Pa. 1811), with the obscure statement that because the statute was a criminal law Justice Washington's reliance on it "does not imply any view about whether Congress had recognition power." SG Br. 37, n.7. Is the Solicitor General suggesting that Clark could have been criminally prosecuted even if the statute did not amount to official United States recognition of Haiti as a French dependency? The standard for a criminal prosecution is surely more, not less, demanding than for civil proceedings.

(4) Madison's Refusal To Receive Onis – The Solicitor General's brief cites President Madison's initial refusal in 1809 to receive Luis Onis and Madison's acceptance of Onis in 1815 as proof of the President's exercise of the "sole" power to recognize foreign sovereigns. SG Br. 21. We reproduce the 1809 and 1815 Madison correspondence as Appendix II to this Reply Brief. Madison's objection to Onis apparently grew out of Onis' personal "indecorous & criminal conduct towards the U.S." which would make him *persona non grata*. Neither letter refers in any way to an "exclusive" recognition power, and the content of both letters demonstrates that Madison was uncertain whether, under the prevailing law-of-nations standard, Onis was representing the controlling sovereign.

E. The Solicitor General's Brief Totally Ignores the Substantial Historical Research That Contradicts Its Position.

We quoted in our principal brief the conclusion reached by Professor Robert J. Reinstein of Temple Law School after an exhaustive historical survey that "executive recognition decisions are not exclusive but are subject to laws enacted by Congress." Pet. Br. 56. The Solicitor General's brief in this Court totally ignores that scholarly research. The brief neither cites the research nor refers to it in any manner. Instead, it selectively chooses and mis-describes isolated incidents that purportedly prove that recognition authority vests exclusively with the President.

II.

CONGRESS HAS CONSTITUTIONAL AUTHORITY TO AFFECT FOREIGN POLICY AND RECOGNITION DECISIONS

The Solicitor General's brief (p. 10) notes that "[t]he Executive has unilaterally made hundreds of recognition decisions concerning states, governments, and territorial shifts" – a self-evident proposition that we do not dispute.

Presidents routinely make an initial recognition determination, and the Solicitor General's brief marshals the many instances when Congress agreed with Executive Branch recognition decisions and therefore expressed no dissenting view. These examples include the recent recognition of Somalia and South Sudan and the refusal to recognize

Russia's annexation of Crimea. They are entirely irrelevant to this case because in this case Congress has expressed its disagreement.

The Founding Fathers deliberately did not exclude Congress from the formulation of America's foreign policy. Specifically enumerated powers assigned to Congress by the Constitution invest that body with important powers over foreign affairs such as the authority to declare war and to regulate foreign commerce. More than one-third of the Senate may block a treaty with a foreign sovereign negotiated by the President, and nominees for ambassadorial posts abroad must be approved by the Senate. The *amicus curiae* brief submitted for the United States Senate notes (p. 6) that "Congress exercises legislative authority in numerous areas significantly affecting foreign affairs, including appropriating funds, regulating foreign commerce, imposing customs duties and tariffs, declaring war, and raising and supporting the Nation's military forces." See also Brief for Members of the United States House of Representatives as *Amici Curiae*, pp. 5-13.

We acknowledge that the President routinely takes the first step in recognizing a foreign sovereign. The issue presented by this case is not whether the President may make that initial decision; it is whether Congress is constitutionally barred from any role whatever in the recognition process.

The Solicitor General's brief (pp. 22-26) argues that recognition decisions should be reserved exclusively for the President because (a) the

Executive Branch has unique "institutional capabilities" in the field of foreign relations, (b) the President may "gather and assess" information relevant to a recognition judgment "in a timely and decisive manner" and without public disclosure, and (c) "international uncertainty about the United States' position" is avoided if no branch of government other than the Executive may make the recognition decision. None of these considerations justifies excluding Congress from the recognition process.

Congress has no greater "institutional incapability" in addressing a recognition decision than in addressing any of the many foreign-affairs related subjects that bear on issues of immigration or foreign commerce, or on the Senate's decision whether to approve a treaty. The factors and policies that Congress considers in legislating within its enumerated and implied powers on the wide range of subjects affecting foreign affairs are not substantively different from those that are relevant in a recognition determination.

There may, indeed, be occasions when recognition of a foreign sovereign must be made in a "timely and decisive manner" and when quick action is necessary. We do not challenge the President's authority to take timely action – as President Truman did in recognizing the State of Israel in 1948. President Truman's decision was not rejected or disapproved by Congress, and its validity is, therefore, undisputed. The Executive Branch's policy regarding the status of Jerusalem or how Jerusalem-born citizens are to be identified in passports may similarly have been valid when initiated. But if that

policy was, as the Solicitor General contends, an offshoot of a recognition determination, Congress had the power, in the words of William Rawle, to "dissent from the executive recognition," and Congress' decision then prevails.

The Solicitor General's claim that a recognition decision may not be made to "hinge" on a subsequent Congressional determination because "the United States' apparent recognition position could flip back and forth" applies equally to any foreign-policy decision announced by a President that Congress could reverse with a later statute. Whether more severe sanctions should be imposed on Iran to deter development of its nuclear capability is a current illustration of apparent public disagreement between Congress and the President. No one has suggested that Congress is barred from legislating on this subject because American policy would be perceived as "flipping back and forth." Moreover, the appearance that American foreign policy "flips back and forth" results whenever a President changes his mind or alters earlier announced policy statements. Judgmental changes of policy by a President are not prohibited because of such a perception.

The Solicitor General's brief (p. 23) cites the acknowledgement in the *amicus curiae* brief filed in this case by Members of the United States House of Representatives that "functional" considerations in the modern world often require quick decisions. But the same brief also observes that "Congress has regularly legislated in ways that touch on, and even register discord with, official recognition policy, in the proper exercise of its foreign affairs,

immigration, naturalization, passport, appropriations, and general law-making powers."

Justice Sutherland's extravagantly erroneous dictum in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936), that the President is "the sole organ of the federal government in the field of international relations," and his accompanying discussion are cited nine times in the Solicitor General's brief to support the Solicitor General's proposition that Congress may play no role in the recognition process. SG Br. 9, 10, 18, 19, 23, 24, 53, 54. The dictum's overbreadth is demonstrated by the *amicus curiae* brief of Members of the United States House of Representatives (pp. 5-13) that canvasses the many responsibilities Congress exercises in structuring American foreign policy, making it a co-equal "organ of the federal government in the field of international relations." The dictum is also cogently refuted in the Brief *Amicus Curiae* of Louis Fisher. This Court may take this opportunity to remove it as an obstruction to meaningful analysis in future cases concerning the separation of powers in foreign affairs.

The Solicitor General concedes that cases in which this Court's opinions said that the President has "sole" authority to recognize a foreign sovereign "did not specifically address a congressional attempt to constrain the President's recognition power." SG Br. 40. As "an inferior court," the court of appeals nonetheless treated dicta by this Court as "authoritative." 725 F.3d at 212. Its reliance on this language has been effectively criticized. See Note, 127 Harv. L. Rev. 2154, 2161-2162 (2014). This case is, therefore, the first opportunity for this Court to

address the separation-of-powers issue directly – if that issue is reached.

III.

THIS COURT'S SEPARATION-OF-POWERS PRECEDENTS CONFIRM THE CONSTITUTIONALITY OF SECTION 214(d)

The Solicitor General's brief leaves to its next-to-last page a curt dismissal of this Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and the "familiar tripartite scheme" in Justice Jackson's concurring opinion (343 U.S. at 634-655) that this Court adopted and applied in *Medellin v. Texas*, 552 U.S. 491, 524 (2008), and other cases. The Solicitor General contends that this case is in none of Justice Jackson's three categories because recognition of foreign sovereigns is "a subject that the Constitution commits exclusively to the President." SG Br. 58; see 343 U.S. at 638, n.4.

Authority to recognize foreign sovereigns is not an "enumerated power" that the Constitution confers on the President. Nor is there any decision of this Court that has given the President this exclusive power. Compare *Myers v. United States*, 272 U.S. 52 (1926), which Justice Jackson cited in support of his exception from Category Three of an instance in which the President was granted an "exclusive" power.

The Executive Branch policy that is at issue in this case is "is incompatible with the expressed . . . will of Congress" as manifested in Section 214(d). Hence this case falls into the third of Justice

Jackson's categories, where the President's power is "at its lowest ebb." 343 U.S. at 637-638.

Moreover, this Court has held that Congressional authority may be confined and limited in a contest between Congress and the President only if Congress' statute would prevent the Executive Branch from "accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Recognition of foreign sovereigns is not a specifically enumerated "constitutionally assigned function." Hence this Court's decision in the *Nixon* case permits Congress to overrule or limit the President's implied power on this subject.

This Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), calls for the same result. Congress' enactment of the Independent Counsel Act was sustained because the law did not deprive the President of his ability "to perform his constitutionally assigned duties." 487 U.S. at 696. By the same token, Section 214(d) is constitutional because it does not affect specifically enumerated Presidential powers. See also the Brief of Amicus Curiae Public Citizen, Inc., in this case.

IV.

PASSPORT ADMINISTRATION IS A FAMILIAR LEGISLATIVE SUBJECT

The Solicitor General's brief strains to find a basis for Presidential authority to regulate the mode of identification of a passport-holder. The "content of a passport," it declares, is within the President's

constitutional power "as it relates to recognition." SG Br. 43. The brief then contends that the Executive Branch may regulate the contents of passports "as instruments of diplomacy." *Id.*

These are thin reeds on which to base exclusive Presidential authority to nullify a law that is, on its face, passport regulation. It is manifestly clear from the admissions of the Department of State that the place-of-birth entries on a passport are not designed to be "instruments of diplomacy" or to "relate to recognition." They are included on a passport primarily in order to identify the passport-holder.

Regulation of passports is a common subject of federal legislation. Congress deals routinely with passport administration, and passport laws are well within Congress' powers to regulate foreign commerce, naturalization, and immigration. Congress could, for example, pass a law directing that a city of birth be designated on a passport along with the country of birth. There would be no serious constitutional doubt about its power to do so. Or Congress could, by statute, direct that passports not record a place of birth. Section 214(d) comes well within traditional passport regulation and may be sustained in this case as a passport law notwithstanding the Executive Branch's assertion that its effect "interferes" with the power to recognize foreign sovereigns.

V.

NO PROBATIVE EVIDENCE SUPPORTS THE ASSERTION THAT SECTION 214(d) "INTERFERES" WITH THE POWER TO RECOGNIZE FOREIGN SOVEREIGNS

Neither in the courts below nor in this Court has the Solicitor General made any factual showing that there is substance to its repeated threat that there would be "severe" consequences from a change in policy that would permit U.S. citizens born in Jerusalem to carry passports that identify them – as U.S. citizens born in Tel Aviv or Haifa are identified – as born in "Israel." The *amicus curiae* brief of the Zionist Organization of America demonstrates how ubiquitously the designation "Jerusalem, Israel" appears in federal publications. These references much more directly imply that the United States recognizes Jerusalem as being within the jurisdiction of Israel than a passport that says "Israel" and does not specify any city. The combination of the city (Jerusalem) and the country (Israel) in an official United States government publication should "provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments" much more than permitting approximately 50,000 additional United States citizens to carry passports identifying them as born in "Israel."

It is simply untrue that enforcement of Section 214(d) would amount to "asserting in official documents that Jerusalem is under Israeli sovereignty." SG Br. 54. The Department of State or,

indeed, the President himself could make a public declaration when Section 214(d) is implemented that United States policy regarding Jerusalem remains unchanged. The face of the passport of an American citizen born in Jerusalem would thereafter be indistinguishable from the face of the passport of an American citizen born in Tel Aviv or Haifa.

If this Court were to invalidate Section 214(d) on the wholly inadequate showing in this record of any palpable adverse consequence from its enforcement, every law enacted by Congress that affects foreign policy, however remotely, would be subject to a similar challenge. The President could then refuse to enforce such a law if he stated his opinion that it will interfere with his conduct of foreign affairs.

VI.

THE TAIWAN PRECEDENT DEMONSTRATES THAT DESIGNATIONS ON A PASSPORT ARE NOT RECOGNITIONS OF SOVEREIGNTY

The Solicitor General's brief leaves for last his response to the extraordinarily parallel experience 20 years ago when Congress yielded to requests of natives of Taiwan and enacted into law their right to have passports recording their place of birth as "Taiwan" rather than "China." In that instance, every United States passport bearing the word "Taiwan" was an affront to the sovereign that the United States had officially recognized, and the insult was so intense that the People's Republic of China had refused to issue visas on United States passports recording "Taiwan" as a place of birth. JA 180-181, 183-186. If Section 214(d) is enforced in this

case, additional United States passports will simply display the word "Israel," rendering them indistinguishable from the passports of American citizens born in Tel Aviv or Haifa. That is surely a lesser affront to the "Arab and Muslim world" than "Taiwan" was to the Chinese.

Once Congress passed the Taiwan legislation, the Executive Branch complied with it and preserved the President's asserted foreign-policy and recognition authority by issuing a formal public statement that the change of passport policy did not alter the United States' official position on China's jurisdiction over Taiwan. The Solicitor General responds by citing the Taiwan Relations Act and declaring that the "Taiwan" passport designation "confirms the United States' unofficial relationship with Taiwan." SG Br. 59. Documentation in the record of this case establishes, however, that, contrary to the Solicitor General's representation that the 1994 process was in harmony with existing foreign policy, the Department of State predicted in 1994 that permitting "Taiwan" to be recorded on United States passports "would have a negative effect on our relations with the PRC and Taiwan." JA 178-179. The grain of salt with which that prediction should have been taken can accompany the Solicitor General's dire predictions regarding the implementation of Section 214(d).

The Taiwan experience demonstrated that the designation of a place-of-birth on a passport is not tantamount to a formal recognition of sovereignty. That same lesson applies to the implementation of Section 214(d).

VII.

GRANTING THE EXECUTIVE BRANCH "SOLE" AUTHORITY TO RECOGNIZE FOREIGN SOVEREIGNS COULD HAVE DAMAGING CONSEQUENCES

In his brief the Solicitor General reports on recent recognition decisions made by the President that followed consensus views in the United States. There was, for example, no popular dissent to the recognitions of Somalia and South Sudan. Nor has there been disagreement in the United States to the President's protest of, and active opposition to, Russia's occupation of Crimea. The refusal to recognize Russia's annexation was a popular step.

But what if the President had chosen, because of foreign policy considerations he deemed important, to recognize Russia's annexation of Crimea? What if the President determines unilaterally, as part of his negotiations to limit nuclear development, to recognize the current government of Iran? The Constitution and our system of balance-of-powers surely does not contemplate that such Executive Branch decisions are beyond review and revision by the Congress.

The constitutional danger of assigning "exclusive" recognition power to the President is no less than the danger that this Court and Justice Jackson foresaw in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), when President Truman claimed a similar inherent Presidential power to seize the nation's steel mills. The Court noted Congress' "exclusive constitutional authority to make laws necessary and proper to carry out the

powers vested by the Constitution" and added that "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." 343 U.S. at 588-589.

Justice Jackson's historic concurrence voided "executive action" that "originates in the individual will of the President and represents an exercise of authority without law." 343 U.S. at 655. Jackson declared, "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.*

Identical constitutional values require the rejection in this case of the President's claim to an "exclusive" right to recognize foreign sovereigns.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed with instructions to enter summary judgment for the plaintiff and order the Secretary of State immediately to enforce and implement Section 214(d).

Respectfully submitted,

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APPENDIX I

John Adams

Proclamation 10 - Suspending, as to St. Domingo, the Restraints of the Act of 1799

June 26, 1799

By the President of the United States of America
A Proclamation

Whereas by an act of the Congress of the United States passed the 9th day of February last, entitled "An act further to suspend the commercial intercourse between the United States and France and the dependencies thereof," it is provided that at any time after the passing of this act it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interests of the United States, by his order to remit and discontinue for the time being the restraints and prohibitions by the said act imposed, either with respect to the French Republic or to any island, port, or place belonging to the said Republic with which a commercial intercourse may safely be renewed, and also to revoke such order whenever, in his opinion, the interest of the United States shall require; and he is authorized to make proclamation thereof accordingly; and

Whereas the arrangements which have been made at St. Domingo for the safety of the commerce of the United States and for the admission of American vessels into certain ports of that island do, in my opinion, render it expedient and for the

interest of the United States to renew a commercial intercourse with such ports:

Therefore I, John Adams, President of the United States, by virtue of the powers vested in me by the above-recited act, do hereby remit and discontinue the restraints and prohibitions therein contained within the limits and under the regulations here following, to wit:

1. It shall be lawful for vessels which have departed or may depart from the United States to enter the ports of Cape Francois and Port Republican, formerly called Port-au-Prince, in the said island of St. Domingo, on and after the 1st day of August next.

2. No vessel shall be cleared for any other port in St. Domingo than Cape Francois and Port Republican.

3. It shall be lawful for vessels which shall enter the said ports of Cape Francois and Port Republican after the 31st day of July next to depart from thence to any other port in said island between Monte Christi on the north and Petit Goave on the west; provided it be done with the consent of the Government of St. Domingo and pursuant to certificates or passports expressing such consent, signed by the consul-general of the United States or consul residing at the port of departure.

4. All vessels sailing in contravention of these regulations will be out of the protection of the United

States and be, moreover, liable to capture, seizure, and confiscation

Given under my hand and the seal of the United States, at Philadelphia, the 26th day of June, A. D. 1799, and of the Independence of the said States the twenty-third.

JOHN ADAMS

APPENDIX II

From James Madison to Caesar A. Rodney, 22 October 1809

To Caesar A. Rodney

DEAR SIR

I have duly recd. yours accompanied by the pamphlet of T. on the Batture. You are right I think in your ideas on the subject, and wd. do well in writing to Poydras as you suggest.

Onis could not as you anticipated, be recd. Whatever noise may be made on the occasion, the thing can not admit of doubt with men who consult their judgments, not their sympathies with Spain, nor their enmities towards the administration. Is Ferdinand or the Junta, in actual possession of the Govt.? This is the sole question for us, a question of fact, which all the most recent & authentic information decides in the negative.

Jackson & Mr. S. have been breaking a lance. When shall we have the pleasure of your aid in our deliberations? Accept my affectionate respects.

JAMES MADISON

From James Madison to James Monroe, 18 April 1815

I recd. yesterday yours of the 14th. The confidential letters in it were returned by the same mail addressed to you as you suggested. The case of Genl. Ripley is in several respects a delicate one. If he is not satisfied with being breveted, and insists on a Court of Enquiry, as a matter of right, ought he not still to have one? A refusal may subject the administration, to a suspicion of motives, which however unjust may be turned to injurious purposes. I leave the question with you & Mr. Dallas, who understand all the circumstances better than I do. You have been already authorized to decide the other question of retaining him as the 4th. Brig: Genl. which I presume will be deemed eligible. I learn however that it will create new difficulties with some very reputable officers such as Bissel, who will not, in that case remain in the Army, and for whom other satisfactory provision may be impossible. The case of Bissel & Smith particularly are hard ones, on acct. of their active merits; as that of Cushing & others is for long services, & a want of other resources. Have you been able to find any provision yet for Genl: W.? I have not yet got thro' his voluminous trial, amidst the interruptions which occur. In a day or two more, I hope to return it to the War Dept.

I return the communications from Govr. Claiborne. I wonder at the delay of Genl. J. in reporting the proceedings to which they relate. Mr. Dallas's letter to him, will I hope, answer the desired purpose: but it may happen otherwise,
notwithstanding the advantageous shape given to the experiment

Mr. Graham sent me the letter from Onis, of which a translation was kept for you. He seems now to require not only a reception of him, but an acknowledgment of his commission dated in 1809. With an apology for so long delaying it. It is remarkable that whilst the King is denouncing & persecuting the Cortes, as an illegitimate body, and annulling the proceedings during his absence, he should consider the appt. of Onis as so peculiarly & obviously valid, as to forbid even a new edition of it. It is a fair suspicion, that the whole affair is an intrigue of Onis & his patron Cevallos; and is little, if at all a point, with the Court. If you think it worthy of consideration, whether any and what answer should be given, and whether on a view of all the facts known to the Dept. of State, it might not be best to receive him. I wish you to bring your associates into a Consultation on the subject, and to act upon it, if delay be thought inexpedient. If there be ground to believe that Spain & G. B. are on a footing, which makes it advisable to overlook the objections which have thus far prevailed, to Onis, & that the acknowledgment of him will have any important effect on the Councils of Spain in that or any other respect, which concerns the U. S; such a step ought not to be longer witheld. But is there any evidence as yet, of any such connection between those powers, or that it would be affected by our receiving, Onis, or asking the substitution of one not personally objectionable or that the question relating to him, is essentially mingled with the general policy of Spain towards us. With the knowledge we have of his indecorous & criminal conduct towards the U. S. and the knowledge the Spanish Govt. have both of that conduct, and of our knowledge of it, the case of

his reception under such circumstances, & after so long objecting to it, would I fear, whenever made public, not make an impression in our favor, unless great considerations of National interest called for a disregard of all minor ones. I repeat however that I wish you in concert with the other members of the Cabinet to take up the subject, under all its aspects, and prospects, and I shall be governed by the result. Affe. Respects

JAMES MADISON

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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SUPREME COURT, U.S.

No. 13-628

IN THE

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
BY HIS PARENTS AND GUARDIANS,
ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN JEWISH COMMITTEE IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS*[1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance human rights and democratic values in the United States and around the world. As part of that mission, AJC recognizes that the well-being and dignity of United States citizens born in Jerusalem is protected and enhanced as a result of Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228 § 214(d), 116 Stat. 1350 ("Section 214(d)").

Section 214(d) requires the Secretary of State to record in United States passports the place of birth of a United States citizen born in Jerusalem as "Israel" upon the request of the citizen. In doing so, the statute upholds the dignity of United States citizens born in Jerusalem who wish to identify Israel as their nation of birth. At the same time, Section 214(d) in no way obstructs or contradicts longstanding American policy, endorsed by AJC, in support of a peaceful, negotiated resolution to the status and geographic boundaries of Israel and its neighboring states. AJC thus has a particular interest in the outcome of this litigation, as it relates directly to AJC's core mission.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously held the constitutional power to recognize a foreign sovereign—or, stated more accurately in this case, to recognize the territorial integrity of a recognized foreign sovereign, the nation of Israel—is reposed "exclusively" in the President under the Constitution. *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 1873 (2014). In so holding, the Court of Appeals endorsed an inaccurate view of history, finding that "[b]eginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations." *Id.* at 207. This is not an accurate statement of the historical recognition power, nor of what the executive has historically "believed" the recognition power to be. The consequences of the Court of Appeals' decision are far-reaching, depriving Congress of any role or influence in any foreign policy decision touching upon the purported "exclusive" recognition power of the President.

A scrupulous and evenhanded examination of the historical record discloses no purpose or design to leave such unfettered discretion in the hands of the executive branch alone. Rather, the record shows: (1) at the time the Constitution was written and ratified, neither its drafters nor its ratifiers signaled any intention to accord to the President plenary authority to recognize foreign governments; (2) from the ratification of the Constitution to the present, although the President has customarily taken the lead on recognition, he has frequently acknowledged a concurrent and at times superior role for Congress; (3) Congress has historically exercised legislative

predominance over United States passports, and the President has faithfully executed congressional acts and respected statutory limits with respect to passports; and (4) the exercise of congressional authority in Section 214(d) to permit United States citizens born in Jerusalem to have their place of birth listed as "Israel" on their passports is consistent with historical practice.

History does not, in short, place the recognition power and all related decisions within an exclusively executive domain, fortified against the slightest tremor of legislative interference. Congress has a constitutional balancing role with respect to recognition decisions, as it does in other fields of domestic and foreign policy. It properly exercised its authority to direct the Secretary of State regarding the contents of passports, and did not infringe on any plenary field of executive authority. Section 214(d) is therefore constitutional.

ARGUMENT

I. NO EVIDENCE EXISTS THAT THE DRAFTERS OR RATIFIERS OF THE CONSTITUTION INTENDED TO VEST PLENARY RECOGNITION AUTHORITY IN THE PRESIDENT

The Court of Appeals found neither the text of the Constitution nor the originalist evidence of "much help" in determining the source or scope of the President's recognition power. *Zivotofsky*, 725 F.3d at 206. AJC agrees with this finding. The Constitution is silent on the power to recognize foreign governments, despite its enumeration and allocation of many other foreign affairs powers. *See* U.S. CONST. art. I, §§ 1, 8; U.S. CONST. art. II, §§ 1, 2, 3. A

"thorough review" of the drafting and ratification debates "reveals that no issue concerning the recognition power was even raised[.]" Robert J. Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. RICH. L. REV. 801, 819-20 (2011).

A. The Constitutional Convention Never Considered Recognition.

The proceedings at the Constitutional Convention of 1787 disclose no intention to vest a plenary recognition power in the President. Leading proponents of a strong executive, including James Wilson and Alexander Hamilton, mentioned neither the recognition power nor the Receive Ambassadors Clause during their otherwise lengthy discourses on executive authority. *See* Reinstein, 45 U. RICH. L. REV. at 814, 844 (*quoting* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 65-66, 292 (rev. ed. 1966)). The Receive Ambassadors Clause also engendered no debate; the draft clause submitted by the Committee of Detail was revised to add "and other public Ministers," but otherwise received no attention. *Id.* at 843-44 (*citing* 2 RECORDS OF THE FEDERAL CONVENTION at 419). The clause is not included as a "'power' of the President" in Section 2 of Article II, but rather "is placed in Section 3 of Article II, which contains a list of executive duties." *Id.* at 813 (*quoting* Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 37-38 (2d ed. 1996)). This treatment of the Receive Ambassadors Clause is more consistent with "a simple ministerial function" than "an important executive power," and presents "no evidence" that the delegates viewed the clause "as vesting the recognition power in the President." *Id.* at

845. There is "no record" that the subject of recognition "ever came up in the Convention." *Id.*

B. The Ratification Debates Did Not Address Recognition.

The ratification debates likewise reveal no plans to vest plenary recognition power in the President. There is "practically nothing of substance about the Receive Ambassadors Clause" in the ratification debates, and nothing regarding the recognition power. Reinstein, 45 U. RICH. L. REV. at 846-48. THE FEDERALIST PAPERS addressed the Receive Ambassadors Clause only briefly, with Alexander Hamilton arguing that it was "more a matter of dignity than of authority," because it would be "far more convenient" to have the President perform the function than to convene Congress "upon every arrival of a foreign minister[.]" Alexander Hamilton, Federalist No. 69, *in* THE FEDERALIST PAPERS 419 (2003); *see also* Federalist No. 77, *Id.* at 462. Federalist pamphlets similarly regarded the Receive Ambassadors Clause as a ministerial function. Reinstein, 45 U. RICH. L. REV. at 848 & n. 339 (*citing A Native of Virginia, Observations upon the Proposed Plan of Federal Government* (April 2, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655-56 (2009); *Albany Federal Committee, An Impartial Address* (April 20, 1788), in 21 THE DOCUMENTARY HISTORY 1379-81)). The one reference to the clause in the state convention debates also treated it as ministerial. *Id.* at 847 (*quoting* Archibald Maclaine (July 28, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION OF PHILADELPHIA IN 1787 1, 135 (2d ed. 1836)).

II. THE PRESIDENT'S HISTORICAL EXERCISE OF THE RECOGNITION POWER ACKNOWLEDGES A CONCURRENT AND AT TIMES SUPERIOR ROLE FOR CONGRESS

Turning to the post-ratification evidence, the Court of Appeals found a "longstanding and consistent" post-ratification practice supporting the Secretary's position "that the President exclusively holds the recognition power." *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 207 (D.C. Cir. 2013) *cert. granted*, 134 S. Ct. 1873 (U.S. 2014). An impartial examination of the historical evidence, however, establishes no "universal and long-established tradition" of exclusive executive authority in this area. *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002).

The question of recognition and whether it "is entrusted, under the constitution, to the discretion of the president acting alone, or whether it is vested in congress, or requires the joint action of the political departments of the government" has been "much discussed" since ratification. John Bouvier and Francis Rawle, 1 BOUVIER'S LAW DICTIONARY: A CONCISE ENCYCLOPEDIA OF THE LAW 1124 (3d rev. 1914) ("BOUV."). These discussions offer little if any evidence of a plenary executive recognition power.

Indeed, for most of the nation's early history, the President accepted input and cooperation from Congress, and often expressed deference to Congress on questions of recognition. While the President has often taken the lead on recognition decisions, and Congress has often acquiesced, both have consistently acknowledged that Congress has at least concurrent recognition powers, and on a number of occasions the

President has yielded to the superiority of congressional recognition authority.

A. Early Discussions of Recognition and the Acknowledgment of a Superior Recognition Power in Congress.

Following ratification, early administrations devoted considerable attention to the question of whether the power to recognize foreign governments resided with the President, Congress, or both. From these discussions, a prevailing view emerged that recognition was a concurrent power that should be exercised cooperatively. In the event of a conflict, however, the President generally conceded that Congress held the superior recognition authority.

1. Washington and the Neutrality Crisis.

The Court of Appeals began its analysis with Washington's unilateral recognition of the French post-revolutionary government during the Neutrality Crisis of 1793 as evidence that the executive has believed since Washington "that it has the exclusive power to recognized foreign nations." *Zivotofsky*, 725 F.3d at 207. The decision of the Washington administration to receive a minister from France's post-revolutionary government, however, did not place Washington in conflict with Congress, nor was it defended by him as an exercise of exclusive executive power.

The Neutrality Crisis arose when Congress was not in session. Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 380 (2012). Washington recognized the post-revolutionary French government based on his belief that the Take Care Clause, U.S. CONST., art. II, § 3, obligated him to do so under the

rule of *de facto* recognition and his duty to faithfully execute the law of nations. *See* Reinstein, 46 U. RICH. L. REV. at 375-81; Reinstein, 45 U. RICH. L. REV. at 839 (*citing* a statement approved by Washington from Thomas Jefferson to Gouverneur Morris (March 12, 1793), in Thomas Jefferson, 25 THE PAPERS OF THOMAS JEFFERSON 367 (1995)); David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 138-39 (1996)). Affirming that "every nation has a right to govern itself internally under what form it pleases, and to change these forms at it's [sic] own will," Washington concluded in the Proclamation of Neutrality that the "will of the nation" required recognition. 45 U. RICH. L. REV. at 839.

Contrary to the characterization by the Court of Appeals, the Cabinet divided over the Neutrality Crisis. *Compare Zivotofsky*, 725 F.3d at 208 (*citing* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 312 (2001)), *with* Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 9-10 (2013). *See also* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1010 (2013). The issue of whether receiving the Ambassador would ally the United States with France instigated a public debate between Alexander Hamilton as "Pacificus" and John Madison as "Helvidius" over the extent of inherent executive power in foreign affairs. William R. Casto, *Pacificus & Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 613 (2001). Hamilton defended the Proclamation of Neutrality as required under the law of nations and the Executive Power Clause of the Constitution. *Id.* at 617. He described the power to determine foreign relations, including the recognition and war powers,

as "a concurrent authority." *Pacificus* No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 34, 42 (H. Syrett & J. Cooke eds., 1969). Madison, writing under pressure from Thomas Jefferson, attacked this broad construction of Executive Power, arguing that the President has no power to declare war or repeal treaties even by use of his own powers. Casto, 28 N. KY. L. REV. at 628. Even at this early stage, then, the power to manage the republic's affairs with other nations was not unanimously committed by the Founders to the executive branch.

Moreover, when Washington later considered removing the diplomatic authority of France's controversial foreign minister, "Citizen" Edmund Genet, he had Thomas Jefferson draft a message to Congress stating his intention to remove Genet's diplomatic authority *unless either house objected.* Reinstein, 46 U. RICH. L. REV. at 426-28. Though the issue became moot when France recalled Genet, this planned consultation reflects Washington's understanding of a concurrent role for Congress in discretionary (as opposed to ministerial) exercises of diplomatic authority.

The Neutrality Crisis thus stands as "important precedent for the duty of the Executive to obey the constraints of international law," but offers no basis for "developing or supporting any modern general theory of executive power." Reinstein, 46 U. RICH. L. REV. at 377-78. Consistent with that conclusion, court decisions in the decades after the Neutrality Crisis regarded the recognition power as belonging to both the President and Congress. *See United States v. Palmer*, 16 U.S. 610, 643 (1818) (stating that courts "must view such newly constituted government as it is viewed by the legislative and executive departments");

Clark v. United States, 5 F. Cas. 932, 933-34 (Cir. Ct. D. Pa. 1811) (treating recognition as an issue for either the executive or legislature, and construing an act of Congress to determine whether St. Domingo had been recognized).

2. The Haitian Revolution and the Non-Intercourse Laws.

In the midst of the Quasi War with France in 1798, Congress passed an act embargoing trade with France and her dominions. Reinstein, 86 TEMP. L. REV. at 15. (*citing* Act of June 13, 1798, ch. 53, 1 Stat. 565, 565). When the act was renewed in 1800, Congress amended the language to read that "the whole of the island of Hispaniola" will be considered part of France, even though Spain had transferred the colony of Santo Domingo by treaty but had not yet ceded actual control. *Id.* (*citing* Act of Feb. 27, 1800, ch. 10, § 7, 2 Stat. 7, 10). Congress, not the President, thus recognized the territorial limits of France.

In *Clark*, Justice Washington, while riding circuit, held that the defendant violated the 1809 embargo of France by trading with the Haitian people. 5 F. Cas. 932. *Clark* cites the Non-Intercourse Act of 1806 as a clear recognition of "the sovereignty of France over the island," which cannot be overturned by a court. *Id.* (*citing* Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351). This was an early judicial acknowledgment of the legislative power of recognition. *See* Reinstein, 86 TEMP. L. REV. at 18.

3. Monroe and the Recognition of the South American Republics.

The earliest extended discussion of the recognition powers of the President and Congress arose during the Monroe administration, in its deliberations over

whether to recognize the new South American republics who declared independence from Spain in 1816. 1 BOUV. 1124. The Court of Appeals greatly oversimplifies this discussion, characterizing it as an instance in which the President "prevailed in a standoff" with Speaker of the House Henry Clay over the recognition power. *Zivotofsky*, 725 F.3d at 208. A more careful consideration of the historical evidence reflects acknowledgment by the executive of a concurrent role for Congress in recognition decisions.

President Monroe was uncertain of his recognition power, and sought advice from his Cabinet. Julius Goebel, THE RECOGNITION POLICY OF THE UNITED STATES 120 (1915); 6 THE WRITINGS OF JAMES MONROE 31 (1969). Secretary of State John Quincy Adams argued that Congress should not have "any share in the act of recognition," because it was "an act of the Executive authority." John Bassett Moore and Francis Wharton, 1 A DIGEST OF INTERNATIONAL LAW § 75 at 244 (1906) ("MOORE INT. L. DIG."); Goebel, RECOGNITION POLICY at 121-23. Secretary of the Treasury William H. Crawford and Attorney General William Wirt advised obtaining the consent of Congress, because the Senate must act upon the nomination of any minister and the House must assent to the necessary appropriations. John Quincy Adams, 4 MEMOIRS OF JOHN QUINCY ADAMS 204-06 (1875). Monroe agreed with Crawford and Wirt, stating that the better course of action would be for Congress to be "pledged beforehand" to recognition. *Id.*; 1 MOORE INT. L. DIG. § 75 at 244.

In Congress, meanwhile, Clay announced his intention to pursue recognition of the South American republics, and introduced various bills and resolutions from 1818 to 1821 appropriating funds to that end.

Goebel, RECOGNITION POLICY at 121, 131-33; 32 Annals of Congress, 15th Cong., 1st Sess., vol. ii, at 1469 (1818); Samuel Flagg Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES 200 (1936). Clay argued that both the President (under the powers to receive and send ministers) and Congress (under the Declare War and Commerce Clauses and its appropriations power) had recognition authority. 1 BOUV. 1124-25 (*citing* 32 Annals of Congress, 15th Cong., 1st Sess., vol. ii, at 1468, 1607-08, 1616, 1618, 1655).

Though Clay's appropriation bill was defeated as noted by the Court of Appeals, he proposed a concurrent resolution to give President Monroe the "Constitutional support" of Congress when "he may deem it expedient to recognize the sovereignty and independence" of these new nations. Goebel, RECOGNITION POLICY at 133. This passed by "large majorities" in each house. *Id.* Historians have treated the first bill as defeated not out of constitutional concerns, but from differing views on "foreign policy and partisan politics." Reinstein, 86 TEMP. L. REV. at 20 (citing Samuel Flagg Bemis, THE LATIN AMERICAN POLICY OF THE UNITED STATES: AN HISTORICAL INTERPRETATION 36-47 (1943); Frederic L. Paxson, THE INDEPENDENCE OF THE SOUTH AMERICAN REPUBLICS: A STUDY IN RECOGNITION AND FOREIGN POLICY 174 (2d ed. 1916)). Congressional recognition of the former Spanish colonies was a roadblock to the treaty negotiated with Spain that eventually ceded Florida into the Union. *Id.* at 24–25. Clay's actions in the house, even though unsuccessful, delayed Spanish ratification by two years. *Id.*

On March 8, 1822, Monroe delivered a message to Congress communicating "the sentiments of the executive" on recognition and seeking "cooperation

between the two departments of the government[.]" 1 BOUV. 1126; American State Papers, Political Condition of the Spanish Provinces of South America, 17th Cong., 1st Sess., No. 327 (Mar. 8, 1822). Monroe expressed his judgment that the time had come to recognize the republics, and requested "the necessary appropriations for carrying it into effect." 1 BOUV. 1126. Congress approved his request. *Id.* *See also* 1 MOORE INT. L. DIG. § 75 at 245; Bemis, A DIPLOMATIC HISTORY at 200-01. The Senate committee on Foreign Affairs approved unanimously, and the House appropriated $100,000 to give effect to the recognition. Goebel, RECOGNITION POLICY at 136.

In harmony with this example, William Rawle's early commentary on recognition stated that the President's decision is "binding" unless countermanded, but that Congress "possesses a superior power" of recognition, and "may declare its dissent from the executive recognition or refusal[.]" 1 BOUV. 1129 (*quoting* William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 195-96 (2d ed. 1829)). *See also* 1 BOUV. 1129-30 (*quoting* Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1560 (1833)) (stating that Congress might override an executive recognition decision, but that the issue remained "open to discussion"). The Supreme Court likewise treated recognition as an area of primarily legislative authority. *See Cherokee Nation v. State of Georgia*, 30 U.S. 1, 46-47 (1831) (stating that the court must "conform its decisions to the will of the legislature" on acts of recognition).

4. Jackson and the Texas Debate.

The next discussion of recognition centered on the Republic of Texas, which began seeking recognition from the United States in 1835. *See* 1 BOUV. 1126-27.

President Jackson was concerned that recognition would split the Democratic Party and could lead to war with Mexico. Thomas A. Bailey, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 242 (9th ed. 1974). Congress favored recognition, and passed resolutions that the independence of Texas should be recognized upon "satisfactory information" of an operational civil government. Cong. Globe, 24th Cong., 1st Sess. 453 (1836); H.R. Rep. No. 24-854 (1836). The Senate Committee on Foreign Affairs reported a resolution stating that recognition "may be made by the United States in several ways," including by treaty, by statute, or by sending or receiving diplomatic agents. 1 BOUV. 1126-27; 24 Gales & Seaton's Register of Debates, Senate, 24th Cong., 1st Sess. 1847-48 (June 18, 1836). The Senate report also stated that, where the President has failed to act, he "may be quickened in the exercise of his power" by act of Congress. 1 BOUV. 1127; 24 Gales & Seaton's Register 1848.

Jackson delivered a message to Congress on December 22, 1836, conceding that there had never been any "deliberate inquiry" into whether the President or Congress held the recognition power. 1 BOUV. 1127; 24 Gales & Seaton's Register of Debates, House, 24th Cong., 2nd Sess. 1137-40 (Dec. 22, 1836) He added that he was "disposed to concur" with the view that "recognizing the independence of Texas should be left to the decision of congress," as doing so would afford the "fullest satisfaction" to the people of the United States. *Id.* Jackson opined that the recognition of Texas was premature, but that if Congress disagreed, "I shall promptly and cordially unite with you." *Id.* Historian Julius Goebel explained that "Jackson saw greater guarantees" of separation of powers "[i]n congressional control over recognition" as they were the "body by whom war can alone be

declared." Goebel, RECOGNITION POLICY at 158. Jackson did not claim exclusive recognition authority and was even willing to be bound by a congressional determination evincing at least shared, if not superior, power of recognition in the legislature.

On February 28, 1837 and March 1, 1837, the House and Senate passed resolutions appropriating funds for a diplomatic agent to Texas, and in the case of the Senate resolution, stating that the "independent political existence" of Texas should be acknowledged by the United States. Cong. Globe, 24th Cong., 2nd Sess. 83, 194, 214 (1837). *See also* 1 BOUV. 1127; 1 MOORE INT. L. DIG. § 75 at 245. On his last day in office, March 3, 1837, Jackson recited the resolutions, stated that he felt it was his "duty to acquiesce therein," and appointed a chargé d'affaires to Texas. Andrew Jackson, *Message to the Senate* (Mar. 3, 1837), in 3 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 281-82 (1902).

5. Polk and the Palermo Controversy.

In 1848, a question of recognition arose during the Polk administration, when the consul of the United States at Palermo, without authorization, recognized the independence of Sicily. 1 MOORE INT. L. DIG. § 41, at 117-18. On October 31, 1848, Secretary of State (and future President) James Buchanan wrote to the consul instructing him that the recognition was a nullity. Buchanan described recognition as an "act of high sovereign power," and stated that, "In the United States, such a recognition is usually effected, either by a nomination to, and confirmation by the Senate of a Diplomatic or Consular agent to the new Government, *or by an act of Congress.*" *Id.* § 75 at 245-46 (*quoting* 10 MS. Dispatches to Consuls 489) (emphasis added). Buchanan noted that "[t]he latter course was adopted,

in the recognition of the independence of the Spanish-American Republics." *Id.* at 246.

6. Taylor and the Hungarian Revolution.

In 1848, Hungary revolted against the Habsburg monarchy of Austria and sought an independent republic. On June 18, 1849, Secretary of State John Clayton dispatched Ambrose Dudley Mann as a special agent to investigate. Clayton instructed that, should the new government of Hungary prove to be firm and stable, "the president will cheerfully *recommend to congress*, at their next session, the recognition of Hungary," and had no doubt that "her independence would be speedily recognized by that enlightened body." Letter from Clayton to Mann (June 18, 1849), *in* Zachary Taylor, Message from the President of the United States: Communicating Copies of the Correspondence with the Agent employed to visit Hungary during the Recent War between that Country and Austria, S. Exec. Doc. No. 31-43, at 5-6 (1850) (emphasis added). *See also* 1 BOUV. 1127.

B. The President's Shift Towards a More Assertive Executive Recognition Power, While Still Acknowledging a Concurrent Role for Congress.

Presidential administrations began in the mid-1800s to adopt a more robust view of executive recognition power. Even as this more assertive view emerged, however, the President continued to acknowledge and Congress continued to claim an important, concurrent legislative role.

1. Pierce and the Consular Remodeling Statute.

The Pierce administration was the first to allude to executive ascendancy in diplomatic recognition, but stopped short of asserting plenary authority. On June 2, 1855, Attorney General Caleb Cushing issued an opinion construing a law remodeling the consular system, which provided that the President "shall" appoint consuls in certain places, including Haiti. 1 BOUV. 1126 (*quoting* 7 Op. Attys. Gen. 242, in Ellery C. Stowell, CONSULAR CASES AND OPINIONS (1909)). Cushing interpreted this to mean that the President "may" appoint such consuls "if he *See* fit," because requiring the President to appoint a consul would have the effect of commencing diplomatic relations with Haiti, a role that Cushing argued the Constitution "has intrusted [sic] to the sole discretion of the executive." *Id.* at 242, 245, 250. Even as he asserted "sole discretion," however, Cushing also acknowledged that Congress had significant concurrent authority with respect to the descriptions, functions, compensation, and appointment of consular officers. *Id.* at 248. This concurrent authority soon manifested in a significant role for Congress during the Lincoln administration over whether to recognize Haiti.

2. Lincoln and the Recognition of Haiti, Liberia, and Mexico.

Early recognition decisions during the Lincoln administration evoked the deferential attitudes of the Monroe, Jackson, Polk, and Taylor administrations. In his first message to Congress in December 1861, Lincoln urged the recognition of Haiti and Liberia, but stated that he was "[u]nwilling" to "inaugurate a novel policy in regard to them without the approbation of Congress," and therefore submitted to Congress "for

your consideration the expediency of an appropriation for maintaining a chargé d'affaires near each of those new States[.]" *Lincoln's First Annual Message to Congress* (Dec. 3, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 47 (James D. Richardson ed., 2004). *See also* 1 MOORE INT. L. DIG. § 75, at 244. A year later, Congress enacted a law authorizing the President to appoint diplomatic representatives to Haiti and Liberia. Cong. Globe, 32nd Cong., 2nd Sess. 1814-15 (April 24, 1862); *Id.* at 2536 (June 3, 1862). This went further than a mere "appropriation" as construed by the Court of Appeals, *Zivotofsky*, 725 F.3d at 210, and specifically instructed the executive to appoint a representative to those nations and thus legislatively recognized them. *See* Reinstein, 86 TEMP. L. REV. at 31. In November 1864, the Senate ratified a "treaty of friendship" with Haiti and then Liberia shortly thereafter. Charles H. Wesley, *The Struggle for the Recognition of Haiti and Liberia as Independent Republics*, 2 J. NEGRO HIS. 369, 382 (Oct. 1917).

Three years later, Lincoln was more assertive with regard to the recognition of Archduke Ferdinand Maximilian von Habsburg as Emperor of Mexico following France's intervention in the region. *See* Martha Mechaca, NATURALIZING MEXICAN IMMIGRANTS 42-43 (2011). Viewing these events as a violation of the Monroe Doctrine, the House of Representatives unanimously passed a resolution on April 6, 1864, stating that the United States does not "acknowledge any monarchical government erected on the ruins of any republican government in America under the auspices of any European power," and supporting ousted president Benito Juárez. *Id.* at 43; 1 BOUV. 1127; Cong. Globe, 38th Cong. 1st Sess. 1408 (1864).

The French government requested an explanation. Secretary of State William Seward responded in a letter to William Dayton, Minister to France, on April 7, 1864, stating that the House resolution "truly interprets the unanimous sentiment of the people of the United States in regard to Mexico," but adding that the decision whether to adopt that position "is a practical and purely executive question, and the decision of it constitutionally belongs, not to the House of Representatives, nor even to Congress, but to the President of the United States." *Letter from William Seward to William Dayton* (Apr. 7, 1864), in Cong. Globe, 38th Cong. 1st Sess. 2475.

Yet Seward also stated that the President received the House Resolution "with the profound respect to which it is entitled, as an expression of its sentiments upon a grave and important subject." *Id.* Indeed, in a letter a day earlier from Seward to French minister M.L. De Geofroy, Seward declared that, "this government has long recognized, and still does continue to recognize, the constitutional government of the United States of Mexico as the sovereign authority in that country, and the President Benito Juárez as its chief," while adopting a position of "absolute neutrality" between the belligerents. 1 EXECUTIVE DOCUMENTS PRINTED BY ORDER OF THE HOUSE OF REPRESENTATIVES DURING THE FIRST SESSION OF THE THIRTY-NINTH CONGRESS, 1865-66, at 359 (1866).

Congress did not capitulate to Seward's view of executive primacy on recognition. Immediately following Seward's letter, the House Committee on Foreign Affairs expressed its shock at the "novel and inadmissible" idea that the President had sole authority of recognition. Goebel, RECOGNITION POLICY at 196–97. On December 15, 1864, it passed a

resolution affirming its right to an "authoritative voice" in "the recognition of new powers," and stating that "it is the constitutional duty of the President to respect that policy[.]" 1 BOUV. 1127; Cong. Globe, 38th Cong. 2nd Sess. 48 (1864). The debate ended unresolved when Juárez's military supporters overthrew the Maximilian government in 1867. Two decades later, however, the Supreme Court still regarded recognition of a foreign power "as appearing from the public acts of the *legislature* and executive[.]" *Jones v. United States*, 137 U.S. 202, 214 (1890) (emphasis added).

3. Cleveland, McKinley, and the Cuban Recognition Debate.

The contending positions of the past century culminated in a debate under the Cleveland and McKinley administrations regarding the recognition of Cuba's independence following its insurrection against Spain in 1896-1897. On December 21, 1896, the Senate Committee on Foreign Relations unanimously recommended a joint resolution, "[t]hat the independence of the Republic of Cuba be, and the same is, hereby acknowledged by the United States of America." *Notes on International Law*, 43 AM. L. REV. 266, 276 (1909); 1 BOUV. 1124. The resulting debate laid out competing views regarding the recognition powers of the President and Congress.

Secretary of State Richard Olney expressed the "extreme view of the prerogative of the executive on this subject," asserting that the power of recognition "rests exclusively with the executive," and that a congressional resolution "is important only as advice of great weight voluntarily tendered to the executive regarding the manner in which he shall exercise his constitutional functions." 1 BOUV. 1124. Senator

Eugene Hale presented a similar view in a memorandum submitted to the Senate in early January 1897, describing recognition as "an act of the executive (president alone, or president and senate), and not of the legislative branch of the government," but finding it "most advisable as well as proper for the executive first to consult the legislative branch as to its wishes and postpone its own action, if not assured of legislative approval." *Id.* at 1125 (*quoting* Cong. Rec. 54th Cong. 2nd Sess. 663 (1897)); Eugene Hale, Power to Recognize the Independence of a New Foreign State, 54th Cong., 2nd Sess., Senate Doc. No. 56 (1897). *See also* Edward Stanwood, 2 A HISTORY OF THE PRESIDENCY, FROM 1897 TO 1909 12 (1912).

Senator Augustus Bacon, by contrast, argued that congressional recognition was "necessary" if war was a possible outcome, that it was "the proper department of the government to act," and that it at least "has the power to act even if its power is not exclusive." 1 BOUV. 1124-25. Senator Roger Mills agreed, proposing a resolution to recognize Cuba and declaring that "the expedience of recognizing a foreign government belongs to Congress[.]" *Cuba and Spain*, THE OUTLOOK 226 (Jan. 16, 1897). *See also* Stanwood, 2 A HISTORY OF THE PRESIDENCY at 12.

In a notable exchange, Senator Hale acknowledged under questioning that, of the more than one hundred cases of recognition he had researched from "the history of this country for a hundred years," he did not find a single instance in which relations had been determined by the act of recognition by the President without Congress. 1 BOUV. 1125-26 (*quoting* Cong. Rec. 54th Cong. 2nd Sess. 682). Rather, "[i]n every one of the cases," recognition "was made by the executive

department, acted upon, submitted to, and not questioned" by Congress. *Id.*

McKinley ultimately sent a special message to Congress on April 11, 1897, recommending and giving his reasons for intervention in Cuba. *Id.* at 1127. Congress responded with a joint resolution on April 20, 1897, declaring that the people of Cuba were free and independent, demanding that Spain relinquish its authority and government in the island, and authorizing the President to use military force to carry the resolutions into effect. *Id.* (*citing* 6 MOORE INT. L. DIG. § 909). Thus, McKinley "acted in accordance with the view . . . of his predecessors, Presidents Monroe and Jackson, in consulting congress and securing its joint action in a case which was likely to result in war." *Id.* at 1127-28.

The Court of Appeals is correct that the proposed language from 1896 recognizing the "Republic of Cuba" was removed from the final resolution, *Zivotofsky*, 725 F.3d at 210, but the joint resolution that came out of conference did recognize that Spain no longer had sovereignty over its former colony. Reinstein, 86 TEMP. L. REV. 40–41. In Joint Conference, the House allowed the bill to recognize Spain's loss of control, and the Senate agreed to drop the explicit recognition of any revolutionary government. *Id.* at 41. This compromise was acceptable to President McKinley and was signed just three days before Spain declared war on the United States. *Id.*

C. The Power of Recognition in the Modern Era.

Unlike the constitutional authority debates of the Nineteenth Century, the pattern emerging by the mid-Twentieth Century and continuing since has been

more pragmatic. The President now generally initiates action on recognition decisions, and Congress often acquiesces, but at times exercises its own authority to define the limits of recognition. The President then conforms his policies to the acts of Congress.

The case of Taiwan is instructive. From 1949 until the end of 1978, the United States recognized the governing authorities on Taiwan as the Republic of China ("ROC" or "Taiwan"). That changed following rapprochement with the People's Republic of China ("PRC"). On December 15, 1978, the Carter administration announced that the United States would recognize the PRC on January 1, 1979, and would terminate diplomatic relations and its mutual defense treaty with Taiwan. *See* Reinstein, 45 U. RICH. L. REV. at 804-05; Richard Holbrooke, *The Day the Door to China Opened Wide*, Washington Post (Dec. 15, 2008). As part of this diplomatic shift, the Carter administration proposed a law defining how the United States would conduct business with Taiwan, including arms sales, without formal relations. *Id.* Congress revised the proposed draft extensively. *See* 125 Cong. Rec. S2570-2602 (daily ed. Mar. 13, 1979); 125 Cong. Rec. H1255-1289 (daily ed. Mar. 13, 1979); H.R. Conf. Rep. No. 96-71, 96th Cong., 1st Sess. (Mar. 24, 1979). It then passed the Taiwan Relations Act on April 10, 1979, Pub. L. No. 96-8, 93 Stat. 14 (Apr. 10, 1979), *codified* at 22 U.S.C. §§ 3301 *et seq*.

Among its provisions, the new law authorized *de facto* diplomatic relations with the "governing authorities on Taiwan," stated that any international agreements made between Taiwan and the United States before 1979 were still valid unless otherwise terminated, and provided for Taiwan to be treated the

same as "foreign countries, nations, states, governments, or similar entities[.]" Reinstein, 45 U. RICH. L. REV at 804-05. Carter signed the act, declaring that the statute "will enable the American people and the people of Taiwan to maintain commercial, cultural, and other relations without official Government representation and without diplomatic relations." Jimmy Carter, Taiwan Relations Act Statement on Signing H.R. 2479 Into Law (Apr. 10, 1979). Thus, the President initiated the (non-)recognition decision, but Congress subsequently imposed limits that the President accepted.

The Taiwanese Relations Act amounted to *de facto* recognition by Congress, because it treated Taiwan as a foreign sovereign in all but name. Reinstein, 86 TEMP. L. REV. at 49. The Foreign Minister of the PRC objected to the bill as "equivalent to recognizing Taiwan as a country[.]" *Id.* (*citing* Telegram from the Embassy in China (Woodcock) to the Department of State (Mar. 16, 1979), in 8 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1977-1980: CHINA 835, 837). The congressional action on Taiwan, like the Cuban resolution in 1898, is an expression of shared power because Congress defined the exact expressions of the recognition desired by the President. *Id.* In both instances, Congress strengthened the President's proposal and did everything short of formal recognition of the government at issue. *Id.*

III. THE ISSUANCE OF PASSPORTS IS AN AREA OF TRADITIONAL LEGISLATIVE AUTHORITY IN WHICH THE PRESIDENT HAS FAITHFULLY EXECUTED CONGRESSIONAL DIRECTIVES

With respect to the "passport power," the Court of Appeals acknowledged "it is clear that the Congress

has exercised its legislative power to address the subject of passports," but further concluded that Congress does not have "exclusive control over all passport matters" and found "the Executive branch has long been involved in exercising the passport power, especially if foreign policy is implicated." *Zivotofsky*, 725 F.3d at 215. This again oversimplifies and misconstrues the history to erroneous ends. In contrast to the oft-contested recognition power, the historical record of legislative predominance with respect to the passport power is clear. From the ratification of the Constitution through the present, Congress has consistently exercised legislative authority over passports, and the President has carried out its directives.

The Continental Congress first gave responsibility to the Department of Foreign Affairs to issue United States passports in 1782. Craig Robertson, THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT 26 (2010). Upon ratification of the Constitution, Congress derived its legislative power over the issuance and control of passports from multiple constitutional provisions. Congress has the exclusive authority to legislate "Naturalization" and "Commerce with foreign Nations." U.S. CONST. art. I, §§ 1, 8. Bundled within the power to regulate commerce is the power to regulate the movement of people, affording Congress legislative authority over immigration as well. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824). "It is beyond dispute that Congress's immigration, foreign commerce, and naturalization powers authorize it to regulate passports." *Zivotofsky*, 725 F.3d at 221 (Tatel, J., concurring).

Congress passed its first passport law in 1790, providing punishment for the violation of United

States passports. Robertson, THE PASSPORT IN AMERICA at 26 (*quoting* 1 Stat. 118: Rev. State 4062 (1790)). The newly renamed Department of State issued passports as travel passes that asked a foreign government to allow a holder to enter a country, move about freely for lawful pursuits, and receive aid and protection that the United States would give its own citizens. *Id.* at 26.

Before 1856, issuing passports was not exclusively federal; governors, mayors, and notaries public could legally issue them. *Id.* at 131; *Zemel v. Rusk*, 381 U.S. 1, 31 (1965) (Goldberg, J., dissenting). These non-federal officials also issued certificates of citizenship and letters of introduction to foreign officials which, in the eyes of foreign governments, called into question the legitimacy of United States passports. Robertson, THE PASSPORT IN AMERICA at 140-41. To address the resulting "confusion abroad," Congress passed the Act of August 18, 1856, ch. 164, § 1, 11 Stat. 119, declaring that passports could only be issued to citizens, giving the State Department sole authority to issue passports under "such rules as the President shall designate and prescribe," and making it illegal for any other authority to issue a passport. *Id.* at 131, 141; *Zemel*, 381 U.S. at 31-32 (*quoting* 11 Stat. 60 (1856)).

Congress repealed part of the Act of August 18, 1856 in March 1863, to allow the State Department to issue passports during the Civil War to noncitizens. Robertson, THE PASSPORT IN AMERICA at 254 (*citing* 12 Stat. 754 (1863)). In 1866, Congress reinstated the citizenship requirement. *Id.* (*citing* 14 Stat. 54: Rev. Stat. 4076, 4078 (1866)). In 1902 and 1907, Congress granted certain passport powers to governors of United States insular possessions and to the State

Department. *Id.* at 255-56 (*citing* 32 Stat. 386 (1902), 34 Stat. 1228 (1907)).

The most unmistakable instance of executive acquiescence in congressional passport authority followed the United States' entry into World War I. At the end of 1917, the State and Labor Departments attempted to impose a requirement that all aliens who intended to enter United States territory have a visa issued by a consul of the United States. *Id.* at 187. The Attorney General ruled that the executive did not have authority to impose such a requirement. *Id. See also* Control of Travel From and Into the United States: Hearings on H.R. 10264 Before the H. Comm. on Foreign Affairs, 65th Cong. 2nd Sess. (1918). The Attorney General did offer the possibility of issuing certificates of citizenship, but the State Department believed that the only certificate of citizenship issued by the executive should be the U.S. passport. Robertson, THE PASSPORT IN AMERICA, at 187; *See* Letter from Robert Lansing, Secretary of State, to Thomas Gregory, Attorney General (Sept. 19, 1917) (on file with the National Archives) ("I cannot with propriety or out of regard to the proper conduct of international relations sanction any plan which would tend to minimize the importance and significance and value of the American passport.").

Following the Attorney General's ruling, the President asked the Secretary of State "to urge upon Congress the passage of the necessary enabling legislation[.]" Control of Travel, 65th Cong., 2nd Sess. Congress responded with the Passport Control Act of 1918, delegating to the President the power in wartime to control the travel of citizens and others to

and from the United States. Robertson, THE PASSPORT IN AMERICA at 187; 40 Stat. 559 (1918). The President could "impose specific restrictions on aliens wishing to enter or leave the country." John Torpey, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 117 (2000). Congress clearly had national security at the forefront of its intentions in that it described the act as: "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety." *Id.* (*quoting* 40 Stat. 559 (1918); *see also Haig v. Agee*, 453 U.S. 280, 296-97 (1981) ("By enactment of the first travel control statute in 1918, Congress made clear its expectation that the Executive would curtail or prevent international travel by American citizens if it was contrary to the national security.").

A few months after Congress passed the Passport Control Act of 1918, President Wilson issued an executive order commanding that "hostile aliens must obtain permits for all departures from, and entries into, the United States." Torpey, THE INVENTION OF THE PASSPORT at 117 (*quoting* Exec. Order No. 2932 (Aug. 8, 1918)). Congress revised the act in 1919 to apply only to individuals seeking to enter the United States, and to eliminate the requirement that the country be at war. *Id.* Congress revoked the act following the conclusion of World War I. Robertson, THE PASSPORT IN AMERICA at 203, 258 (citing 41 Stat. 1217 (1921)).

With the Passport Act of 1926, Congress essentially reenacted the Act of August 18, 1856 and repealed all other passport laws. Robertson, THE PASSPORT IN AMERICA at 258; *Zemel*, 381 U.S. at 30, 32 (quoting 44 Stat. 887, 22 U.S.C. § 211a (1926)). Today, passport law is codified at 22 U.S.C. §§ 211a *et seq*. Current law

authorizes the Secretary of State to grant and issue passports under such rules as the President may designate. 22 U.S.C. § 211a.

This executive discretion, however, comes through legislative grant alone, and is expressly subject to statutory boundaries set by Congress. *See, e.g.*, 22 U.S.C. § 211a (disallowing most travel and use restrictions upon passports); 22 U.S.C. § 212(a)(b)(1) (disallowing passports to persons convicted of sex tourism); 22 U.S.C. § 2714 (disallowing passports to persons convicted of drug trafficking); *see also Zemel*, 381 U.S. at 7-8 (holding that Congress statutorily authorized the Secretary of State in the Passport Act of 1926 to refuse to validate United States citizens' passports for travel to Cuba); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that the Secretary of State could not withhold passports to citizens based on their affiliations with the Communist party because Congress did not expressly grant the Secretary the authority to do so).

Indeed, the President has previously acquiesced to congressional exercise of the passport power under circumstances closely analogous to this case. Congress has enacted a passport law for Taiwan that is virtually identical to Section 214(d), and the President has complied with its directives. In 1994, Congress amended the Foreign Relations Authorization Act to provide that the Secretary of State "shall permit" United States citizens born in Taiwan to list "Taiwan" as their place of birth in passports and consular reports of birth abroad. Pub. L. No. 103-236, title I § 132, 108 Stat. 395 (Apr. 30, 1994), *as amended* by Pub. L. No. 103-415 § 1(r), 108 Stat. 4302 (Oct. 25, 1994). The executive has complied. The U.S. Department of State Foreign Affairs Manual ("FAM") directs

that "Taiwan" shall be printed as the place of birth for an applicant born in Taiwan who writes "Taiwan" on his or her passport application. 7 FAM 1340 App. D § d(6)(d). Thus, while the Court of Appeals is correct that the President has been "involved in exercising the passport power," his involvement has at all times been subordinate to and in compliance with congressional directives.

IV. THE EXERCISE OF LEGISLATIVE AUTHORITY TO PERMIT AMERICAN CITIZENS BORN IN JERUSALEM TO IDENTIFY "ISRAEL" AS THEIR PLACE OF BIRTH IS CONSISTENT WITH THE HISTORICAL AUTHORITY OF CONGRESS IN THE AREAS OF RECOGNITION AND PASSPORTS

Based on its mistaken views of the recognition power as an exclusively executive authority and the passport power as a sphere of coequal authority, the Court of Appeals concluded that Section 214(d) "interferes with the President's exclusive recognition power" by running "headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem." *Zivotofsky*, 725 F.3d at 216. Yet even assuming, *arguendo*, that Section 214(d) expresses through an exercise of the passport power a congressional view on the recognition of Jerusalem as part of Israel that runs against executive branch policy, it remains a valid and constitutional exercise of Congress's authority.

Contrary to the Court of Appeals' conclusions, the historical record teaches that Congress has long occupied the field of recognition as a coordinate and coequal power. *See* Section II, *supra*. Congress has also long held the central position in passport law,

creating, defining, and limiting by statute the President's authority to issue passports. *See* Section III, *supra*. Section 214(d) is thus an ordinary exercise of congressional authority in the areas of the recognition power and the passport power, not an infringement of any "exclusive" executive power.

The relationship between the President and Congress in the recognition of foreign governments, at least insofar as Congress's exercise of the passport power is concerned, is analogous to the status of executive agreements entered into by the President to resolve foreign claims. The Constitution vests no express power to make such executive agreements, but it has been a consistent practice stretching back to the Adams and Monroe administrations. *See* Anne E. Nelson, *Note, From Muddled to Medellín: A Legal History of Sole Executive Agreements*, 51 ARIZ. L. REV. 1035, 1036-42 (2009).

In *Dames & Moore v. Regan*, 453 U.S. 654, 675-88 (1981), the Supreme Court upheld the President's authority to make an executive agreement ending the Iranian hostage crisis. The Court applied the tripartite classification of executive action from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952). Crucial to the Court's determination was its finding that "Congress has not disapproved of the action taken here." *Dames & Moore*, 453 U.S. at 687. The Court also "re-emphasize[d]" that "[w]e do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities," but instead was "not prepared to say that the President lacks the power to settle such claims" where "we can conclude that Congress acquiesced in the President's

action[.]" *Id.* at 688. *See also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (same).

The practical implications of these statements struck home in *Medellín v. Texas*, 552 U.S. 491 (2008), where the Court held that the President did not have the unilateral authority to issue a memorandum requiring state courts to give effect to a ruling of the International Court of Justice. *Id.* at 523-32. The Court distinguished the executive agreement cases, noting that there was no "particularly longstanding practice" of congressional acquiescence to such memoranda. *Id.* at 532. The Court also reiterated that, "[p]ast practice does not, by itself, create power." *Id.* at 531-32 (*quoting Dames & Moore*, 453 U.S. at 686). For the same reason, this Court has held that an executive agreement may be constrained or overridden by an act of Congress. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003), *cert. denied*, 524 U.S. 915 (2004).[2]

In recognition decisions, like executive agreements, the President has often enjoyed congressional support or acquiescence. *See* Section II, *supra*. That historical record, however, is hardly unbroken. Even where the President and Congress have cooperated, Congress has often asserted its own recognition power, and the President has acceded at times to the view that Congress has greater recognition authority. *Id.* That includes, in the case of Taiwan, carrying out

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[2] *See also Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182-83 (2nd Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983); *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 620 (D.D.C. 1980).

congressional directions on the labeling of passports that contradict the President's non-recognition of Taiwan. *See* Section III, *supra*. Where Congress has so acted, the President's power is at its "lowest ebb[.]" *Youngstown*, 343 U.S. at 637. On those occasions, the President has often yielded to or cooperated with Congress on questions of recognition. *See* Section II, *supra*.

Here, the authority of Congress in enacting Section 214(d) is magnified by the fact that Congress is exercising its power in a field of traditional congressional predominance—the regulation of passports. The President exercises his defined authority to prescribe passport rules pursuant to an express grant of authority by Congress, and subject to express statutory limits. *See* Section III, *supra*; 22 U.S.C. §§ 211a *et seq*. To the extent that Section 214(d) implicates the recognition power at all, its effect is minimal, as it neither grants nor rescinds recognition of Israel or the Palestinian Authority, nor modifies the United States' diplomatic relationship with either authority, but merely permits United States citizens born in Jerusalem to choose to identify "Israel" as their country of origin. That falls squarely within the historical sphere of congressional authority over the issuance and contents of passports. Consequently, the President is obligated to "take Care that the laws be faithfully executed," U.S. CONST. art. II, § 3, and must enforce and give effect to Section 214(d).

CONCLUSION

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring). Congress has deliberated and has concluded that United States citizens born in Jerusalem should be permitted to identify their place of birth as Israel. The President may disagree with that decision, but it falls squarely within long-recognized areas of congressional authority, and infringes no plenary zone of executive authority. For these reasons, AJC respectfully submits that Section 214(d) is constitutional and should be upheld.

Respectfully submitted,

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July 2014

AMICUS CURIAE BRIEF

No. 13-628

IN THE

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
BY HIS PARENTS AND GUARDIANS, ARI Z. AND,
NAOMI SIEGMAN ZIVOTOFSKY,
Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, impermissibly infringes the President's power to recognize foreign sovereigns. Section 214(d) states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. 1366.

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INTEREST OF *AMICUS CURIAE* [1]

The American-Arab Anti-Discrimination Committee ("ADC") is the country's largest Arab American civil rights organization. As a non-profit grassroots organization, ADC is bipartisan and secular. Founded in 1980 by U.S. Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide. ADC has been at the forefront of protecting the Arab-American community for over thirty years against discrimination, racism, and stereotyping. ADC seeks to preserve and defend the rights of those whose Constitutional rights are violated in the United States ("U.S.").

ADC's interest in this case arises from Section 214(d)'s discriminatory intent and effect on Arab Americans, specifically Palestinian Americans. ADC has growing concerns of Congress pushing forward discriminatory and biased legislation in favor of Israeli Americans and against Palestinian Americans, even when that legislation is unconstitutional. Section 214(d) of the Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350 is unconstitutional and an example of discriminatory and biased legislation.

The sensitive status of Jerusalem is a central issue in the Israeli-Palestinian conflict, and therefore is central to the foreign policy strategies set forth by the President to the United States via the Executive

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[1] This *amici curiae* is filed with consent from both parties pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission of this brief.

Powers granted by the Constitution. The U.S. policy on the status of Jerusalem has always been to remain neutral. The mishandling of the status of Jerusalem will negatively impact any prospects for peace in the Middle East. Arab Americans have a stake and interest in the peace process as this has a direct impact on their personal lives.

Jerusalem is also very important to those in the Arab American community, as Arab Americans are composed of persons of both the Christian and Muslim faiths.[2] Jerusalem for centuries has been at the epicenter of debates of the Abrahamic religions: Christianity, Islam, and Judaism.[3] Thus, a unilateral decision by Congress to concretely and/or symbolically recognize Jerusalem as under Israel territory implicates foreign policy concerns not suited for decision-making by Congress.[4]

As the nation's largest Arab-American civil rights organization, ADC has a duty to voice the concerns on behalf of our constituents and the Arab-American community. The rights of ADC's constituents will be fundamentally affected by the Court's determination of the Constitutionality of Congress enactment of Section 214(d) because it effectively excludes Palestinian Americans born in Jerusalem from rights and/or benefits bestowed to other American citizens born in Jerusalem.

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[2] *See* PBS, *Caught in the Crossfire, available* at http://www.pbs.org/itvs/caughtinthecrossfire/arab_americans.html (noting that "the majority of Arab-Americans are Christian").

[3] JIMMY CARTER, PALESTINE: PEACE NOTE APARTHEID 19 (2006), *citing* JIMMY CARTER, THE BLOOD OF ABRAHAM: INSIGHTS INTO THE MIDDLE EAST (1985).

[4] *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

STATEMENT

The purpose of the *Amicus* is to urge this Court to affirm the Court of Appeal's holding that Section 214(d) of the Foreign Relations Authorization Act is unconstitutional because Section 214(d) impermissibly infringes on the executive's exclusive Constitutional authority to decide whether and on what terms to recognize a foreign government. *Zivotofsky v. Secretary of State*, 725 F. 3d 197 (D.C. Cir. 2013).

First, the *Amicus* argues that the United States ("U.S.") President has exclusive power to recognize foreign sovereigns and their territorial boundaries and that Section 214(d) infringes on the Executive's powers. Second, the *Amicus* argues that Section 214(d) is an unconstitutional delegation of Congress' legislative power and/or regulatory authority to private citizens. Lastly, the *Amicus* argues Section 214(d) violates the Equal Protection Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THAT SECTION 214(D) IMPERMISSIBLE INFRINGES ON THE EXECUTIVE BRANCH'S EXCLUSIVE AUTHORITY TO RECOGNIZE FOREIGN SOVEREIGNS AND DECIDE THEIR TERRITORIAL BOUNDARIES.

A. The Executive Branch has the Exclusive Power to Recognize Foreign Sovereigns.

1. Constitutional Text

Article II of the United States Constitution grants the President foreign affairs power, including the

power to recognize foreign governments. Article II §2 grants the President the power of Commander in Chief of the United States Army and Navy, the power to make treaties, and the power to appoint ambassadors.[5] Further, Article II, §3 of the Constitution provides that the President "shall receive Ambassadors and other public Ministers."[6] These powers make the President the nation's principal organ of foreign affairs. As Alexander Hamilton explained, "[t]he Legislative Department is not the *organ* of intercourse between the United States and foreign Nations. It is charged with neither with *making* nor interpreting Treaties. It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers."[7] Rather, "[t]he right of the Executive to receive ambassadors and other public Ministers. . . . includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognized or not."[8] The power to recognize foreign governments is a function of the Executive's duty to preserve the peace by maintaining a state of neutrality until war is declared and part of the duty to receive ambassadors, as receipt of ambassador indicates recognition of ambassador's country.[9]

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[5] U.S. CONST., art. II, § 2,

[6] U.S. CONST., art. II, § 3.

[7] Alexander Hamilton, *Pacificus No. 1,* U.S. National Archives (June 29, 1793), *available at* http://founders.archives.gov/documents/Hamilton/01-15-02-0038.

[8] *Id.*

[9] *Id.*

2. U.S. Supreme Court Jurisprudence

This Court has consistently affirmed the Executive's exclusive recognition power as the sole organ of foreign policy.[10] As former Chief Justice John Marshall stated on March 7, 1800 before the U.S. House of Representatives, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[11] The President is the sole organ because, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates."[12]

This Court has also consistently affirmed the President's exclusive role to formally recognize foreign governments.[13] This Court stated in *Banco Nacional de Cuba v. Sabbatino*, that "[p]olitical recognition is exclusively a function of the

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[10] *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (The Executive is the "sole organ of the nation in its external relations"); *see Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("[F]oreign policy [is] the province and responsibility of the Executive"); *see Clinton v. City of New York*, 524 U.S. 417, 445 (1998).

[11] Annals, 6th Cong., col. 613.

[12] *Curtiss-Wright*, 299 U.S. at 319.

[13] *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839) ("It is very clear, that it belongs exclusively to the executive department of our government to recognize, from time to time, any new governments"); *United States v. Belmont*, 301 U.S. 324, 330 (1937) ("[T]he Executive had authority to speak as the sole organ of th[e] government" in matters of "recognition").

Executive."[14] But not only is it the Executive's role to determine recognition, but also to determine the 'underlying policy' governing the question of recognition.[15] It is better for the Executive to determine the underlying policy of recognition because, "[the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war."[16] Given that Israel and Palestine are frequently in a 'time of war' and have been in an ongoing conflict since 1948,[17] the President is in a better position than Congress to determine the appropriate policy underlying recognition of Jerusalem, especially since the status of Jerusalem is one of the chief disputes of the Israeli-Palestinian conflict and the corresponding negotiations for peace.

3. Custom and Balance of Powers Analysis

Centuries-long Executive branch practice of recognition power and congressional acquiescence to the Executive's practice, confirm that the Executive possesses the exclusive recognition power.[18] As

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[14] *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398, 410 (1964).

[15] *Guar. Trust Co. v. United States*, 304 U.S. 126, 137–38 (1938); *United States* v. *Pink*, 315 U.S. 203, 207 (1942).

[16] *Curtiss-Wright*, 299 U.S. at 320.

[17] *See* NOAM CHOMSKY & ILAN PAPPE, GAZA IN CRISIS: REFLECTIONS ON THE U.S.-ISRAELI WAR ON THE PALESTINIANS, (Revised and updated Ed. 2013).

[18] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1987) (stating that recognition power belongs exclusively to the President); JULIUS GOEBEL, JR., THE RECOGNITION POLICY OF THE UNITED STATES 121 (1915).

Congress conceded in it's Brief in Support of the Petitioner, the "President properly takes the lead in performing the ceremonial act of recognition, in his role as the instrument of foreign policy," yet "Congress plays an integral role in shaping that policy."[19] Indeed, the decision of the Court of Appeals to recognize the President's exclusive recognition power does not demote Congress from the President's counterweight in foreign affairs to his minion as Congress claims.[20] The Constitution equips Congress with a variety of foreign affairs powers which it can properly utilize without "purporting to direct the Executive to alter formal recognition policy" as it has in this case.[21]

Congress' 'power of the purse', taxing and spending,[22] and appropriations powers[23] provide Congress with the power to balance the President's foreign affairs power, without infringing on the President's exclusive recognition power.[24] As James Madison articulated, "This power over the purse may,

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[19] Brief for Members of the United States Senate and the United States House of Representatives as *Amici Curiae* in Support of Petitioner on Petition for writ of Certiorari at 12, *Zivotofsky v. Kerry*, (No. 13-628) (2014) [hereinafter *Congress Brief*].

[20] *Id.* at 11.

[21] *Id.* at 13; U.S. CONST. art. I, §8; U.S. CONST. art. I, §8, cl. 18 (Necessary and Proper Clause); U.S. CONST. art. I, §8, cl. 3 (Commerce Clause); *McCulloch v. Maryland*, 17 U.S. 316 (1819) (granting Congress broad implied powers to make laws based on the Necessary and Proper Clause).

[22] U. S. CONST. art. I, §8, cl. 1.

[23] U.S. CONST. art. I, §9, cl. 7.

[24] Peter Raven-Hansen and William C. Banks, *Pulling The Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 897 (1994).

in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[25] Separation of powers requires a balance between Congress' power of the purse and the President's foreign affairs power, neither of which are plenary.[26] Petitioners argue that Congress in the past has passed legislation that deals with recognition. However, the issue is not whether Congress can pass legislation that touches on recognition, but whether Congress can officially usurp the President's recognition power through legislation such as Section 214(d). "The acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation." Section 214(d) directs the Executive how to exercise his power and recognize Jerusalem within the territory of Israel.[27]

Congress can pass legislation touching on recognition so long as it does not act to usurp the Executive's policy on recognition.[28] For example, in 1800, Congress passed legislation touching on recognition by declaring that St. Domingo (Haiti) was still a colony of France. However this was the same as Jefferson's Executive determination, so the legislation did not infringe on the Executive recognition power. Addi-

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[25] The Federalist No. 58, at 359 (Madison) (Gary Wills ed., 1982).

[26] Raven-Hansen, *supra* note 23, at 943.

[27] Section 214(d) purported to establish "U.S. policy with respect to Jerusalem as the capital of Israel." *Zivotofsky*, 725 F.3d 197.

[28] *See* Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 14–30 (2013).

tionally, in 1837, Congress passed legislation appropriating funds for a salary for a diplomatic agent to Texas "whenever the President of the United States may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such a minister."[29] Thus, this appropriations legislation left authority for recognizing Texas as an independent power with the Executive.[30]

In 1979, the United States formally recognized the Government of the People's Republic of China as the sole legal government of China.[31] Following the Executive's decision, Congress utilized its power to pass the Taiwan Relations Act of 1979 ("TRA").[32] The TRA provided many benefits to Taiwan, but the TRA still left open the official decision of formal recognition of the Government of China to the Executive.[33] Unlike the legislation in this Case, the TRA did not intrude on the President's exclusive recognition power.[34] The Executive's "strategic ambiguity" in the TRA left room for Congress to pass legislation without infringing on the Executive's power to conduct foreign relations.[35]

Petitioner's argument that President Clinton's signing of 1994 legislation that permitted U.S. citizen's born in Taiwan to list "Taiwan" as their place

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[29] Appropriations for the support of Government for 1837, ch. 33, 5 Stat. 163, 170 (1837).

[30] *Id.*

[31] *See* Reinstein, *supra* note 28, at 27.

[32] *Id.*

[33] U.S. DEPARTMENT OF STATE, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, U.S. RELATIONS WITH TAIWAN (2014) *available at*: http://www.state.gov/r/pa/ei/bgn/35855.htm.

[34] Reinstein, *supra* note 26, at 49 (2013).

[35] *Id.* at 302-303.

of birth on passports sets precedent for Section 214(d), however this analysis is flawed.[36] When Congress passed a passport statute affecting Taiwan in 1994, the State Department complied "only after determining that doing so was consistent with United States policy that Taiwan is a part of China."[37] In contrast, President George W. Bush stated that if Section 214 imposed a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the nation in international affairs, and determine the terms on which recognition is given to foreign states."[38] Section 214(d) is inconsistent with U.S. policy and thus infringes on the executive's exclusive power.

Similarly, the 1898 joint resolution regarding the status of Cuba did not infringe on the Executive's recognition power, as the resolution did not recognize Cuba as a sovereign nation.[39] Nor did the joint resolution recognize the insurgent government as the legitimate government of Cuba.[40] The resolution merely provided that the United States did not recognize Spain's sovereignty over Cuba as a colony

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[36] Brief of the Petitioner on the Merits at 12, *Zivotofsky v. Kerry* (No. 13-628) (July 15, 2014).

[37] An act to make certain technical amendments relating to the State Department Basic Authorities Act of 1956, 108 Stat. 4299 (1994); *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 216 n.18 (D.C. Cir. 2013).

[38] *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers of the Presidents of the United States: George W. Bush (Sept. 30, 2002) [hereinafter *Bush Statement*].

[39] Joint Resolution For the recognition of the independence of the people of Cuba, no. 24, 30 Stat. 738 (1898).

[40] *Id.*; *see* Reinstein, 86 Temp. L. Rev. at 253.

and the "people" of Cuba were independent.[41] Further, President McKinley opposed the inclusion of the "recognition of Cuba" language and only signed the joint legislation into law after this language was removed.[42] Once again the 1898 joint resolution did not infringe on the Executive's exclusive recognition power because there was no recognition, consistent with U.S. foreign policy. Whereas, Section 214(d) provides recognition even if just symbolic in nature, and is inconsistent with U.S. foreign policy.

B. Section 214(d) impermissibly infringes on the Executive's power to conduct foreign relations.

The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[43] While Congress has significant power over influencing foreign affairs and shaping foreign policy, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction that would not be admissible were domestic affairs alone involved."[44] Further, while Congress has the power to enact passport legislation, this legislation presents a separation of powers problem if it infringes

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[41] *See id.*

[42] *See id.*

[43] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

[44] *Curtiss-Wright Export Corp.*, 299 U.S. at 320; *accord Zemel v. Rusk*, 381 U.S. 1, 17–18 (1965).

on Executive authority to conduct foreign affairs.[45] By enacting Section 214(d) of the Foreign Relations Authorization Act, Congress has impermissibly infringed on the President's power to conduct foreign relations.[46]

Congress downplays the significance of the statute by arguing that it "merely provides a U.S. citizen with the opportunity to fill in a particular field in that citizen's travel documents in a particular manner."[47] President Obama administeration's brief filed in February correctly asserts that the U.S. passport is a political statement on behalf of the U.S. Section 214(d) will have "grave foreign-relations and national-security consequences."[48] Indeed, this Court in *Urtetiqui v. D'Arcy* and *Haig v. Agee* noted that a passport "is addressed to foreign powers" and "is to be considered in the character of a political document."[49] Former President George W. Bush was against this infringement on the Executive's power as well, as he warned of the potentially problematic directive from Congress in Section 214(d).[50] President Bush stated that if Section 214 imposed a mandate, it would

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[45] *Zivotofsky*, 725 F.3d at 216; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Bowsher v. Synar*, 478 U.S. 714, 769 (1986).

[46] Foreign Relations Authorization Act of 2003, Pub. L. No. 107-228, §214(d), 116 Stat. 1350, 1366; GOEBEL, *supra* note 17, at 121.

[47] *Congress Brief*, *supra* note 19, at 15.

[48] Brief for the Respondent in Opposition of Writ of Certiorari at 12, *Zivotofsky v. Kerry* (No. 05-1631) (2014).

[49] *Urtetiqui v. D'Arcy*, 34 U.S. 692, 699 (1835); *Haig v. Agee*, 453 U.S. 280, 292-93 (1981).

[50] *Bush Statement*, *supra* note 38.

"impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the nation in international affairs, and determine the terms on which recognition is given to foreign states."[51]

Section 214(d) clearly purports to make a political statement. On its face, Section 214 is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel."[52] Subsection (a) requests the relocation of the United States Embassy to Jerusalem; Subsection (b) provides that the operation of funds at the Jerusalem embassy can be only used by U.S. Ambassador to Israel; Subsection (c) requires that no funds are used for any publication of any official government document unless the publication identifies Jerusalem as the capital of Israel.[53] Further, the congressional record reveals the intent to make a political statement as Representative Diaz Balart stated, "[t]his legislation requires compliance with existing U.S. law that recognizes Jerusalem as the capital of Israel, which has been the capital of that country since 1950."[54] The aggregation of these strategically drafted sections and the congressional record prove Congress' intent to make a political statement recognizing Jerusalem under Israel.

Section 214(d) overrides the Executive's authority to conduct foreign relations, its authority to recognize other nations and their territorial boundaries, and has broad implications on the separation of powers

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[51] *Id.*

[52] 116 Stat. 1366 §214.

[53] 116 Stat. 1365–1366.

[54] H.R Rep. No. 107-123, at 89 (2002). Rep. Hyde and Rep. Lantos made similar statements, *Id.* at 93.

and U.S. foreign policy. By enacting Section 214(d), Congress has taken the lead in performing the ceremonial act of recognition and amounts to an act of usurpation of executive authority.[55]

C. Section 214(d) implications on the Executive Power are intertwined with the sensitive status of Jerusalem.

Amici would be remiss to fail to articulate the implications of Section 214(d) of the Foreign Relations Authorization Act on the sensitive status of Jerusalem. Recognizing Jerusalem as part of Israel will directly impede on the 'peaceful and negotiated settlement of border disputes'—Jerusalem being at the center of those negotiated border disputes. Section 214 makes a unilateral political statement that would "critically compromise the ability of the United States to work with Israelis, Palestinians, and others to further the peace process."[56]

Since President Harry Truman recognized the nation of Israel in 1948, the Executive branch has consistently exercised its duty to attempt to preserve peace by maintaining Jerusalem's status as neutral.[57] The Executive's actions demonstrate intent to leave

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[55] GOEBEL, *supra* note 18 ("[T]he acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation").

[56] Brief for the Respondent in Opposition of Writ of Certiorari at 3, *Zivotofsky v. Kerry* (No. 05-1631) (2014) (*quoting* Letter from George P. Shultz, Sec'y of State, to Hon. Charles H. Percy (Feb. 13, 1984).

[57] *Id.* at 2, *citing* 6 U.S. Dept of State, *Foreign Relations of the United States 1949: The Near East, South Asia, and Africa* 739–741 (1977).

the question of sovereignty over Jerusalem and its permanent status as an issue to be decided by peace negotiations.[58] In 1983 the Reagan administration opposed a bill that would move the U.S. Embassy to Israel on the contention that such action would violate the Executive's recognition power.[59] In 1992, President George H.W. Bush administration's policy was to oppose actions that were "prejudicial or precedential" to negotiations and "encourage all sides to avoid unilateral acts that would exacerbate tensions or make negotiations more difficult or preempt their final outcome."[60] In an address to the UN 46th assembly President Bush stated, "We must strive to ensure the peaceful, negotiated settlement of border disputes. We also must promote the cause of international harmony by addressing old feuds."[61]

In 1995, Congress sought to undermine the 1993 Oslo Peace Accords by re-introducing legislation that would condition embassy funding on moving the U.S. Embassy in Israel form Tel Aviv to Jerusalem.[62]

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[58] *Id.*

[59] S. 2031, 98th Cong., 1st Sess. (1984); *American Embassy in Israel: Hearing on S. 2031 before the Senate Comm. on Foreign Rel.*, 98th Cong., 2d. Sess. (1984).

[60] U.S. Letter of Assurance to the Palestinians, Oct.18 1991; *see* WILLIAM QUANDT, PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967 (3d ed. 2005).

[61] George Bush, *Address to the 46th Session of the United Nations General Assembly in New York City*. Sept. 23, 1991. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=20012.

[62] Jerusalem Embassy Act of 1995 §7, 109 Stat. 398 (1995); Connie Buck, *Friends of Israel: The lobbying group AIPAC has consistently fought the Obama Administration on policy. Is it now losing influence?* THE NEW YORKER, Sept. 2014, http://www.new

President Clinton amended the bill to include a waiver provision that enables the president to suspend the funding restriction.[63] Clinton invoked the waiver in order to not sabotage the peace efforts and his recognition power.[64] Even Israeli Prime Minister ("PM") Yatzik Rabin, opposed the US legislation because the recognition of Jerusalem as Israel's capitol would endanger the Oslo Peace Process.[65] Further, every U.S. President since Clinton has invoked the national-security waiver.[66] Section 214(d) acts to undercut the Executive's efforts at mediating a comprehensive peace agreement between Israel and Palestine, and a policy to remain a neutral party.[67]

Section 214(d) also infringes on the Executive's role in respect to the international community as the sole organ of the nation in external relations. Historically, customary international law has also played an important role in shaping and/or influencing U.S. foreign policy.[68] United Nations resolutions are evidence of consistent state practice regarding the status of Jerusalem.[69] Most United Nations members

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yorker.com/magazine/2014/09/01/friends-israel (Former AIPAC analyst Keith Weissman admitted, "[t]he idea was to cripple Oslo.")

[63] Buck, *id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* Jean Galbraith, *International Law and Separation of Powers*, 99 VA. L. REV. 987, 990 (2013). The power to accord recognition as a matter of customary international law to foreign nations is also an important interpretive principle. *Id.* at 990–91.

[69] Customary international law is evidenced by general and consistent state practice on account of a sense of legal obligation.

accept the UN proposal that Jerusalem should have international status under international law.[70] United Nations Security Council Resolution 476, adopted June 1980, stated that "all legislative and administrative actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem, have no legal validity and constitute a fragrant violation of the Fourth Geneva Convention."[71] Further, U.N. Security Council Resolution 478, adopted in 1980, rejected an Israeli statute that identified Jerusalem as the "complete and unified" capital of Israel.[72] Since U.S. Passports issued under Section 214(d) would purport to alter the character and status of the Holy City of Jerusalem by listing it as in Israel, Section 214(d) could be considered a violation of the Fourth Geneva Convention[73], which is binding International law under both convention and custom.[74]

Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031.

[70] IRA SHARKANSKY, GOVERNING JERUSALEM: AGAIN ON THE WORLD'S AGENDA, 23, WAYNE STATE UNIV. PRESS (1996).

[71] S/RES/476 (1980) of 30 June 1980 (The resolution was signed by 14 Security Council Members, including England, France, China, and the Soviet Union).

[72] S/RES/478 (1980) of 20 August 1980. (The Resolution states that the Security Council was "deeply concerned," "censures in the strongest terms" and "affirms also that this action constitutes a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.")

[73] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 46, Aug. 12, 1949, 6 U.S.T. 3516. ("Restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities").

[74] Els Debuf, *Customary IHL—helping to improve the protection of victims of armed conflict,* INTERNATIONAL COMMITTEE OF

II. SECTION 214(D) OF THE FOREIGN RELATIONS AUTHORIZATION ACT IS UNCONSTITUTIONAL BECAUSE CONGRESS IS CONSTITUTIONALLY PROHIBITED FROM DELEGATING ITS LEGISLATIVE AND/OR REGULATORY POWERS TO PRIVATE CITIZENS.

Whether Congress holds concurrent powers with the executive branch on foreign affairs has long been debated and discussed in federal case law. Even if it is determined that Congress is not infringing on the executives exclusive power to recognize foreign sovereigns by enactment of Section 214(d), Section 214(d) is unconstitutional under the non-delegation doctrine.[75] Congress cannot delegate its legislative power to private entities.[76] "A delegation of legislative power to [private groups] is utterly inconsistent with

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THE RED CROSS, July 7, 2014. *available at* https://www.icrc.org/eng/resources/documents/interview/2014/07-29-customary-international-humanitarian-law-cihl.htm.

[75] *See United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) (holding that the "legislative power of Congress cannot be delegated); *see Field v. Clark*, 143 U.S. 649, 692 (1892) (same); *see also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41 (1825). Congress cannot delegate powers that are strictly and exclusively legislative. *Id.*; *see also Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). Delegation to agencies requires Congress to provide an intelligible principle to which the agency must conform. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

[76] *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *see Carter v. Carter Coal Co.* 298 U.S. 238 (1936); *see Assoc. of American Railroads v. U.S. Dep't of Trans.*, 721 F. 3d 666, 677 (DC Cir. 2013), *writ of certiorari* granted, 134 S. Ct.2865 (2014); *see also* Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 143–53 (2000).

the constitutional prerogatives and duties of Congress."[77] Logically drawn from this threshold is the position that if Congress cannot delegate its own powers to private entities. Then Congress cannot delegate powers it shares and/or holds concurrently with another government branch to private entities and/or citizens.

The non-delegation doctrine is rooted in the principle of separation of powers.[78] Congress' powers are limited by the United States Constitution. Article I of the United States Constitution proscribes what Congress can do. "All legislative powers herein granted shall be vested in a Congress of the United States."[79] As such Congress does not have authority to extend its powers beyond its enumerated powers that the Constitution authorizes. An offshoot of the constitutional non-delegation doctrine is Congress' prohibition of delegating regulatory authority to private entities.[80]

Federal case law demonstrates that Congress is constitutionally prohibited from delegating its legislative and/or regulatory authority and powers to

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[77] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

[78] *See id. at* 538 (holding Section 3 of the National Industrial Recovery Act an unconstitutional delegation of legislative power to the executive branch); *see Mistretta v. United States*, 488 U.S. 361, 371 (1989). The non-delegation doctrine initiated principally from cases involving delegation of legislative authority to the executive branch. *See id.*; *see Field*, 143 U.S. at 692; *see also Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543–44 (1981) (Rehnquist, J., dissenting).

[79] U.S. CONST. art. I, § 1.

[80] *See Roberge*, 278 U.S. 116; *see Carter*, 298 U.S. 238; *see Assoc. of Am. R.R.*, 721 F.3d at 677.

private entities[81] including private citizens. Distinctive from government agencies, both private entities and citizens are not government instrumentalities bound by official duties and take action on behalf of private interests. Congress, through enactment of Section 214(d) of the Foreign Relations Authorization Act, unconstitutionally delegate's its power and/or regulatory authority to private citizens.

A. Federal law is settled that Congress is Constitutionally Prohibited from Delegating Legislative Power and/or Regulatory Authority to Private Entities.

Congress' delegation of regulatory authority to a private entity is unconstitutional. Congress cannot claim powers which are not granted to it by the U.S. Constitution.[82] A limiting construction of the statue or providing an intelligible principle does not survive constitutional muster.[83] Non-delegation of regulatory authority to private entities is necessary to ensure that regulations are not dictated by persons who are not bound by any official duty and may act for arbitrary or selfish reasons.[84]

In *Carter v. Carter Coal Co.*, this Court held unconstitutional Section 4.III.(g) of the Bituminious Coal Conservation Act, which provided the majorities of coal producers, specifically the producers of two-thirds

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[81] *See Roberge*, 278 U.S. 116; *see Carter*, 298 U.S. 238; *see Assoc. of Am. R.R.*, 721 F. 3d at 670, 677.

[83] *See Carter v. Carter*, 298 U.S. at 291 *referencing Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816).

[83] *Id.* at 671, *citing Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001).

[84] *Assoc. of Am. R.R.*, 721 F.3d at 675.

of the nation's coal, with the power to dictate legally binding employment regulations for small producers. This Court held Section 4.III (g) was an unconstitutional delegation of regulatory authority and beyond the power of Congress.[85] Specifically, Congress' authorized majorities of producers and miners with the power to fix minimum wages binding in their respective districts and fix hours for the entire industry.[86]

In *Forest Serv. Emples. for Envtl. Ethics v. United States Forest Serv.*, the United States Forest Service Agency was found to have delegated significant authority to the National Wild Turkey Federation (NWTF), a private entity.[87] This agency's delegation amounted to an unlawful delegation of the agency's duty to protect the environment.[88] First, the Stewardship Agreement between the U.S. Forest Service Agency and NWTF lacked any enforcement regulation by the U.S. Forest Service over the NWTF.[89] Second, the Stewardship Agreement authorized the NWTF with the power to issue special-use permits, which was in direct violation of the Organic Administration Act as NWTF officers are not federal employees of the agency.[90]

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[85] *Carter*, 298 U.S. at 289–97, 310. The Court also emphasized that Congress has no power to regulate or legislate specifically for the promotion of the general welfare. *Id.* at 289–91, 294, 297.

[86] *Id.* at 310–11.

[87] *Forest Serv. Emples for Envtl. Ethics v. United States Forest Serv.*, 891, 904 (W.D. Ky. 2010).

[88] *Id.*

[89] *Id.* at 904–05.

[90] *Id.*

In *Ass'n of American Railroads v. United States Dep't of Transportation*, the U.S. Court of Appeals held that Section 207 of the Passenger Rail Investment and Improvement Act constituted an unconstitutional delegation of regulatory power to a private entity.[91] Section 207 gave Amtrak the power to jointly exercise regulatory power on equal footing with the Department of Transportation.[92] Amtrak, a member of the Association of American Railroads, also had the power to co-develop regulations on metrics and standards of performance and service quality.[93] If rail carriers failed to satisfy the metrics and standard attributable due to rail carrier's failure to provide preference to Amtrak over freight transportation, the rail carrier would be subject to investigation for infractions.[94] Delegation of regulatory authority to a private entity is unconstitutional.

B. Akin to Non-delegation to Private Entities, Congress is Constitutionally Prohibited from Delegating Legislative Power and/or Regulatory Authority to Private Citizens.

Foremost, the delegation of regulatory authority to private citizens is unconstitutional and problematic as the Constitution neither commits nor authorizes any executive and/or legislative power to private citizens,[95]

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[91] *Assoc. of Am. R.R.*, 721 F.3d at 668, 673–74.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 669–70.

[95] *Id.* at 670 "Fundamental to the public-private distinction in the delegation of regulatory authority is the belief that disinterested government agencies ostensibly look to the public

especially in matters related to foreign affairs. Whether Jerusalem is recognized and/or designated as territory or city of Israel is a highly complex foreign affairs matter not suited for private citizen decision-making. Private citizens have no authority or power over foreign affairs. That power is constitutionally solely authorized to the United States government. However, under Section 214(d), American citizens' born in Jerusalem have the power to request to record their place of birth as Israel on United States government documents—registration of birth, certification of nationality, or passport—implicitly recognizing Jerusalem as Israel's territory.

Second, the delegation of regulatory authority to private citizens is inconsistent with the principle of democratic self-governance.[96] Namely, it puts the power to make rules and regulations into the hands of people whom are not elected by the people nor appointed and/or employed by the government.[97] As such, public accountability is undermined, all the while expanding government power.[98] Delegation to

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good, not private gain. For this reason, delegations to private entities are particularly perilous." *Id.* at 675.

[96] *See* CALVIN R. MASSEY, THE NON-DELEGATION DOCTRINE AND PRIVATE PARTIES, 17 Green Bag 2d 157, 168 (Winter 2014).

[97] *See id.*

[98] *See id.* "It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., Concurring) (expressing the view that the Occupational and Safety and Health Act § 6(b)(5) was an unlawful delegation of legislative authority to the executive).

private entities and/or citizens also creates a system where citizens with the power reap benefits at the expense of less favored citizens.[99]

Third, the delegation of regulatory authority to private citizens vitiates the principle of the public-private distinction in the delegation of regulatory authority.[100] Private entities, unlike public and official bodies are not bound by any official duty, and take action on behalf of their own private interests.[101] This is the same danger present in delegation to private entities.[102] This concern is best demonstrated in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, where a landowner was denied a permit to build on his own land where he failed to obtain consent from his neighbors to build on his own land as required under a land ordinance.[103] This Court held that the land ordinance constituted an improper delegation of authority because neighboring landowners wielded absolute determinative decision-making power over whether a permit was issued or not.[104] This was based on the fact that the building superintendent was bound by the decision of the neighboring landowners, there was no review or appeal, and their refusal to provide consent was final.[105]

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[99] *See id.* at 169–70.

[100] *See id.* at 675–76.

[101] *See Assoc. of Am. R.R.*, 721 F.3d at 675; *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 2014 U.S. Dist. LEXIS 71377, *19 (W.D. Wis. 2014).

[102] *See* MASSEY, *supra* note 89, at 17.

[103] *Roberge*, 278 U.S. at 119.

[104] *See id.* at 121.

[105] *Id.* at 122.

C. Section 214(d) Constitutes a Delegation of Legislative Power and/or Regulatory Authority to Private Citizens.

Private parties may have a limited role in regulation if that role is merely as an aid to a government agency.[106] Specifically, that the government agency retains the discretion to approve, disapprove or modify that regulation.[107] For example, in *Sunshine Anthracite Coal Co. v. Adkins*, delegation of legislative authority to private persons was not found where board members had the power to propose prices on coal to the National Bituminous Coal Commission because the government retained control over the regulation. The board members were subordinate to the Commission, and the Commission determined the prices.[108] The Commission had the final say on all price

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[106] *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *see also Currin v. Wallace*, 306 US 1 (1939). Agencies delegating authority and/or regulation to private citizens have also been identified as being constitutionally problematic. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F. 2d 1095, 1143 (D.C. Cir. 1984) *citing Sierra Club v. Sigler*, 695 F. 2d 957, 963 n.3 (5th Cir. 1983); *see also Am. Textile*, 452 U.S. at 543–44 (Rehnquist, J., dissenting). States have also found that private delegations are unconstitutional under their respective state constitutions. *See e.g., Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 469, 471 (Tex. 1997) (holding that the Official Cotton Growers' Boll Weevil Eradication Foundation Act delegated authoritative power to private interested parties); *see e.g., Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 775–76 (Utah 1994) (striking down statute allowing public utility to veto rate regulation plan of the Public Service Commission).

[107] *See Sunshine*, 310 U.S. at 399.

[108] *Id.* at 388.

proposals, with the power to approve, disapprove, or modify the board members proposals.[109]

However, in this Case, private citizens do not serve in purely advisory or ministerial function. Private citizens are regulating the content of their passport, a power generally preserved for the Executive.[110] The United States Department of State ("DOS") does not retain discretion to review, disapprove or modify the regulation.[111] Namely, the Department of State's disapproval is what initiated this Case.[112] Analysis of Section 214(d) demonstrates that the private citizen is given the power, making the decision of whether Jerusalem is considered part of Israel's territory and the agency. " . . . [T]he Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."[113] The DOS Secretary only reacts in response to a foreign affairs related matter decision made by the private citizen,

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[109] *Id.* at 388, 399.

[110] *See* Passports Act, 22 U.S.C. § 211a.

[111] *See id.*; *see Assoc. of Am. R.R.*, 721 F.3d at 671, n. 5; *see also* Froomkin, *supra* note 68, at 143–44, 146–47. "If [the Department of Commerce] has handed this power over to [*Internet Corporation for Assigned Names and Numbers*, a private nonprofit corporation] even on a temporary basis, without keeping the right to review its decisions, then that delegation violates the non-delegation doctrine and raises major due process concerns". *Id.* at 142. Froomkin argues that granting power over the domain name system and ability to make binding rules on internet registrants, and policymaking authority constituted unlawful delegation of regulatory authority to private parties. *Id.* at 27–28.

[112] *See* Brief of the Petitioner on Petition for Writ of Certiorari at 3, *Zivotofsky v. Kerry*, (No. 13-628) (Nov. 20, 2013).

[113] 116 Stat. 1366.

not by any government branch and/or entity. According to the language and the use of the term "shall," the DOS Secretary must oblige by the private citizen's request, the DOS Secretary cannot refuse.

This Court in *Currin v. Wallace*, upheld the Tobacco Inspection Act, which authorized the Secretary of Agriculture the power to designate markets for selling tobacco after inspection and grading, but only after a majority of the affected tobacco growers approved.[114] The issue in contention before the Court, was the requirement that two-third of the tobacco growers had to approve the Secretary of Agriculture rules before they went into effect.[115] There was no finding of an unlawful delegation of regulatory authority in *Currin* because it was not a delegation.[116] The tobacco growers were not making the law or regulation, and Congress' prescribed the conditions of the regulation's application, and imposed a restriction on its own regulation.[117]

Section 214(d) is distinguishable from the Tobacco Inspection Act at issue in *Currin v. Wallace* because Section 214(d) does not impose a restriction on Congress' own regulation and the government does not retain control of the regulations.[118] Rather the private citizen retains controls and restricts the agency, the DOS, regulations and/or policies. A private citizen is acting on behalf of their own personal interests, expressing their own views on matters of

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[114] *Currin*, 306 U.S. at 15–16.

[115] *Id.*

[116] *See id.*

[117] *Id.*

[118] *See id.*

sovereignty and recognition. Section 214(d) effectively gives private citizens veto power over regulations and/or policies developed by the Department of State. The will of a private citizen becomes absolute. Section 214(d) delegates its regulatory authority and/or powers over a government agency to private citizens.

III. SECTION 214(D) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT.

As argued above, East Jerusalem is illegally occupied territory by Israel, and according to international law any person born there is not born in Israel.[119] By Section 214(d) giving the option for individuals who are born in Jerusalem to claim they are born in Israel, but not allowing any one to claim they are born in Palestine violates the Equal Protection Clause. "No person shall be deprived of life, liberty, or property without due process of law."[120] This Court established in *Bolling v. Sharpe*, the Equal Protection Clause applicable to the federal government through the Fifth Amendment prohibits the federal government from invidiously discriminating between individuals or groups.[121] Section 214(d) violates the Equal Protection Clause because it invidiously discriminates between Israeli Americans and Palestinian Americans, depriving Palestinian Americans of liberty.

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[119] S.C. Res. 476 U.N. Res. Doc. S/RES/476 (June 30, 1980); *see* UN Department of Public Information, *The Status of Jerusalem*, DPI/2276 ch. 12 (Mar. 2003) http://www.un.org/Depts/dpi/palestine/ch12.pdf.

[120] *See* U.S. CONST. amend. V.

[121] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

A. Section 214(d) is a Facial Classification.

Section 214(d) constitutes a classification on its face because Congress is drawing a distinction between people based on national origin. Specifically, Congress is drawing a distinction between Palestinian citizens and Israeli American citizens. This is demonstrated first by the title of Section 214. The title "United States Policy with Respect to Jerusalem as the Capital of Israel" specifically identifies one country, Israel. There is no room for or mention of Palestine. Section 214(d) restricts American citizens to only being able to designate Israel as the country of birth. Palestinian American citizens are not free to choose Palestine as their country of birth. Section 214(d) effectively grants a right to choose one's country of birth to a group of citizens that cannot be freely exercised by another group of citizens, Palestinian Americans. Section 214(d) is a classification of a group of people on its face.

In *Bray v. Alexandria Women's Health Clinic*, this Court addressed the appearance of facially neutral laws, where a state law prohibited all pregnant persons from getting an abortion.[122] This Court reasoned that the law was not facially neutral because the target of the law was still a specific group of people that was readily identifiable, as women can only get pregnant.[123] In *Bray*, this court compared the anti-abortion state law to segregation laws that made it illegal for both Caucasian and African Americans to desegregate.[124] This Court noted that while the law made desegregation for all citizens, it was neither

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[122] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[123] *Id.* at 323.

[124] *Id.*

race-neutral because race was the motivating factor and targeting African Americans.[125] Similarly, while Section 214(d) in theory allows for all Americans born in Jerusalem to seek the benefit of having their place of birth recorded as Israel, this is pretextual. Section 214(d) is not race-neutral, as the race and/or national origin is the motivating factor and targeting Palestinian Americans. Section 214(d) was enacted with discriminatory intent and purpose.[126]

B. Section 214(d) constitutes invidious discrimination and has a discriminatory effect on Palestinian Americans.

"A statute otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race" or national origin.[127] This Court stated in *Washington v. Davis*, that an invidious discriminatory purpose may be inferred where a law neutral on its face, bears more heavily on one race than another.[128] Section 214(d) clearly bears more heavily on Palestinian Americans than any other group. There is a disparate impact on Palestinian Americans because they cannot freely identify their country of birth over the disputed territory of Jerusalem, but Israeli Americans can.

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[125] *Id.*

[126] *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977). Importantly, an Equal Protection challenge to a law does not require it rest solely on racial discriminatory purposes, a discriminatory purpose has to only be a motivating factor. *Id.* at 265–66.

[127] *Washington v. Davis*, 426 U.S. 229, 232 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[128] *Washington*, 426 U.S. at 232.

Congress as the decision maker in the enactment of this statue selected a particular course of action at least in part because of its adverse effects upon an identifiable group.[129] Congress acted with the knowledge that a large proportion of United States citizens born in Jerusalem, mainly Palestinian Americans would likely not seek to record their place of birth as Israel. Section 214(d) was enacted with the intent to benefit Israeli American citizens at the expense of Palestinian American citizens, and effectively excludes them. Congress intended American citizens, namely Palestinian Americans, to not to be able to identify Jerusalem as part of Palestine, but only as a part of Israel.

Palestinian Americans have been powerless in terms of political influence.[130] Lobbying groups with abundant resources such as the American Israel Political Action Committee (AIPAC) routinely exert and utilize their great influence on Congress.[131] "When key votes are cast, the question on the House floor, troublingly, is . . . 'How is AIPAC going to score

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[129] *Pers. Adm'r of Mass. V. Feeney*, 442 U.S. 256, 279 (1979); *Harris v. McRae*, 448 U.S. 297, 323 (1980).

[130] *See* JOHN J. MEARSHEIMER AND STEPHEN M. WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY, 204–28 (2007).

[131] *Id.*; Connie Buck, *supra* note 60 (Former Justice Minister of Israel, Yossi Beilin, describing AIPAC's political motives: "[t]hey always want to punish the Arabs") *Id.*; *see* David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, NY TIMES, Mar. 10, 2006 (Senators including Charles Schumer took action to block the transfer of British controlled ports to an Arab Company, warning that Arab terrorists might "infiltrate" the ports. The House Appropriates Committee voted 62-2 to reject the transfer, because "it allowed the sale of some terminal operations to an Arab state company").

this?"[132] Palestinians have also been without political influence in regards to the status of Jerusalem[133] and Congress' legislating on issues that relating to the Israeli-Palestinian conflict. For example, on July 30, 2014 the House passed a resolution on titled the "Denouncing the use of civilians as human shields by Hamas and other terrorist organizations in violation of international humanitarian law."[134] The resolution was not neutral and the House failed to denounce or criticize Israel's killing of thousands of Palestinian civilians as violations of international humanitarian law.[135]

Section 214(d) also has a discriminatory effect. According to the 2013 Census, there are approximately 101,985 Palestinian Americans and 130,990 Israeli Americans living in the United States.[136] This

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[132] Connie Buck, *supra* note 60 (Former Congressman Brian Baird on voting to appease AIPAC).

[133] Jerusalem Embassy Act of 1995 §7, 109 Stat. 398 (1995).

[134] H. R. Res. 107, 113th Cong. (2014) (passed the House with 102 cosponsors); *see e.g.*, S. Res. 526, 113th Cong. (2014) (resolution passed unanimously) (condemning the United Nations call for an investigation into Israel for potential human rights violations); *see e.g.*, S. Res. 498, 113th Cong. (2014) (resolution passed unanimously) (fails to call on Israel to cease attacks on Palestine).

[135] *See* U.N. Office for the Coordination of Humanitarian Affairs, Situation Report, Aug. 25, 2014.

[136] U.S. Census Bureau, *2013 American Community Survey 1-Year Estimates* (estimated the Arab population in the U.S. at 1,866,851 million); Arab American Institute Foundation, *Demographics* (2012), http://b.3cdn.net/aai/44b17815d8b386bf16_v0m6iv4b5.pdf (2012 study conducted on the adjusted population total of Arab-Americans concluded that that there are approximately 3.5 million Arab-Americans. "The American

means that thousands of Palestinian Americans whom were born in Jerusalem who attempt to obtain a passport, or birth certificate cannot identify their country of birth as Palestine. We also have to bear in mind the impact on future Palestinian American citizens who will also be prohibited from identifying their country of birth.

Section 214(d) also has further discriminatory effect on religion and the sensitive status of Jerusalem. The sentiments of the three Abrahamic religions with ties to Jerusalem: Christianity, Islam, and Judaism, greatly add to the sensitivity of the status of Jerusalem.[137] Jerusalem is acknowledged by all three Abrahamic religions as a "holy land."[138] The U.N. Security Council has noted the "need for protection and preservation of the unique spiritual and religious dimension of the Holy Places in the City."[139] Israel is a completely Jewish state, so identifying Jerusalem as being under Israeli sovereignty on a government document is discriminatory to Christian and Muslim Americans, because it benefits one religion over others.

Section 214(d) is an example of the discriminatory and biased legislation that continues to plague our

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Community Survey identifies only a portion of the Arab population through a question on "ancestry" on the census long form. Reasons for the undercount include the placement of and limit of the ancestry question (as distinct from race and ethnicity").

[137] JIMMY CARTER, PALESTINE: PEACE NOTE APARTHEID 19 (2006), *citing* JIMMY CARTER, THE BLOOD OF ABRAHAM: INSIGHTS INTO THE MIDDLE EAST (1985).

[138] *Id.*; *Matthew* 27:33-35; *Mark* 15:22-25; *John* 19:17-24; Ruth Eglash & Swati Shara, *Raw footage: Israeli forces storm holiest mosque in Jerusalem*, THE WASHINGTON POST, July 18, 2014.

[139] S.C. Res. 476 U.N. Res. Doc. S/RES/476 (June 30, 1980).

nation, implemented to favor, benefit, and/or provide preferential treatment, to one race, ethnicity, religion, and/or group of persons over another. ADC strongly asserts that recognizing Jerusalem as the capital, city or territory of Israel on a passport, birth certificate, certificate of nationality, or any other government issued document invidiously discriminates against Palestinian-Americans.

C. Section 214(d) is Subject to Strict Scrutiny.

Section 214(d) is subject to strict scrutiny because the law involves a suspect class, race and/or national origin classification against Palestinian Americans. Case law is settled that strict scrutiny is exercised where the law involves a suspect class.[140] This Court held in *Brown v. Board of Education* and *Bolling v. Sharpe*, that classifications based on race are highly suspect.[141] This Court went even further in *McLaughlin v. Florida* and *Washington v. Davis*, stating that racial classifications are subject to the most rigid, strictest scrutiny.[142]

Congress has no compelling government purpose for enacting Section 214(d). It bears no rational relationship to a legitimate government purpose and Section 214(d) is unexplainable on grounds other than race and/or national origin. There is no truly significant reason to enact a statute that discriminates against and/or disproportionately favors one group of citizens over another. "Liberty under law extends to

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[140] *Bolling*, 347 U.S. at 499; *Brown v. Bd. of Edu.*, 347 U.S. 483 (1954).

[141] *Id.*

[142] *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Washington v. Davis*, 426 U.S. at 242.

the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[143] In all respects a group of American citizens, Palestinian Americans, are actually prohibited and/or all excluded from a right and liberty granted by law to American citizens.

CONCLUSION

Amicus respectfully urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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September 29, 2014

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[143] *Bolling*, 347 U.S. at 499–500. Liberty is not confined to "mere freedom from bodily restraint." *Id.* at 500.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-628

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
JUL 22 2014
OFFICE OF THE CLERK

MENACHEM BINYAMIN ZIVOTOFSKY, by his parents and guardians, ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE, AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, ASSOCIATION OF PROUD AMERICAN CITIZENS BORN IN JERUSALEM, ISRAEL, B'NAI B'RITH INTERNATIONAL, CENTRAL CONFERENCE OF AMERICAN RABBIS, HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC., JEWISH COUNCIL FOR PUBLIC AFFAIRS, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL COUNCIL OF YOUNG ISRAEL, UNION FOR REFORM JUDAISM, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, WOMEN OF REFORM JUDAISM, AND WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Anti-Defamation League ("ADL") and other prominent Jewish organizations respectfully submit this brief as *Amici Curiae* in support of Menachem Binyamin Zivotofsky.[1]

Founded in 1913 to "fight the defamation of the Jewish people and to secure justice and fair treatment to all," ADL is the world's leading organization fighting anti-Semitism, racism, and all forms of bigotry through programs and services that counteract hatred and prejudice. ADL advocated for passage of the law at issue in this case, as it believes that U.S. citizens born in Jerusalem should have the right to have "Israel" recorded as the country of birth on their passports and consular reports of birth abroad.

The American Israel Public Affairs Committee ("AIPAC") was founded in 1954. AIPAC is registered as a domestic lobby and supported financially by private donations. The organization receives no financial assistance from Israel or any foreign group. AIPAC is not a political action committee and it does not rate, endorse, or contribute to candidates. AIPAC is the only American organization whose principal mission is to lobby the United States government on issues affecting the U.S.-Israel relationship. To this end, AIPAC's over 100,000 citizen-activist members and staff work to educate members of Congress, candidates for public office, policymakers, media professionals and student leaders on college campuses

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[1] ADL obtained consent to file this brief from the parties' counsel of record. ADL's counsel authored this brief in whole. No person other than the ADL or its counsel made a monetary contribution intended to fund its preparation or submission.

about the importance of a strong U.S.-Israel friendship.

The Association of Proud American Citizens Born in Jerusalem, Israel is an ad hoc, web-based organization, administered by both the International Israel Allies Caucus Foundation and the National Council of Young Israel, which consists of Jerusalem-born American citizens who wish to self-identify as U.S. citizens born in Israel. To this end, the Association emphatically supports Menachem Binyamin Zivotofsky's appeal to the Supreme Court.

B'nai B'rith International ("BBI"), the global voice of the Jewish community, is the oldest and most widely known Jewish humanitarian, human rights, and advocacy organization. Founded in 1843, BBI works for Jewish unity, security, and continuity while fighting anti-Semitism and intolerance around the world. Central to BBI's mission is the security and well-being of the State of Israel. BBI joins this brief in support of the Petitioner and urges the United States government to comply with current law.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 members, associates and supporters nationwide. In Israel, Hadassah initiates and supports pace-setting health care, education and youth institutions, as well as land development to meet the country's changing needs. Hadassah has an historic connection to Jerusalem and plays an integral role in its economy as the city's largest non-governmental employer. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of the Jewish community in the United States. Although Hadassah believes that the narrow question in this case can and should

be decided on non-political grounds, Hadassah maintains its strong and long-standing support for the government of Israel and the State as the homeland of the Jewish people.

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of 14 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, the JCPA is dedicated to safeguarding the rights of Jews throughout the world; upholding the safety and security of the State of Israel; and protecting, preserving, and promoting a just, democratic, and pluralistic society. These values motivate JCPA's advocacy. The JCPA recognizes Jerusalem's unique place in the Jewish religion and history.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families, and by safeguarding individual rights and freedoms. Consistent with these ideals, NCJW joins this brief.

The National Council of Young Israel ("NCYI") is the umbrella organization for over 300 Young Israel branch synagogues with over 25,000 families within its membership throughout North America and Israel. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel. NCYI assists its branches in programming and planning through its Departments of Synagogue Services, Rabbinic Services, Women's Programming, Jewish Education, Youth Services, Publications and

Political Action. It is represented in Israel through its office in Jerusalem. NYCI joins this brief in support of the Petitioner.

The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis; and the Women of Reform Judaism that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of their commitment to uphold the right of a U.S. citizen to identify the country in which he or she was born. This right must extend to American citizens born in Jerusalem.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 synagogues across the country. Through its Institute for Public Affairs, the Orthodox Union has participated, typically via *amicus* briefs, in many cases before the Supreme Court which have raised issues of importance to the Orthodox Jewish community. There are few issues of higher symbolic value to the Orthodox Jewish community than the centrality of Jerusalem, toward which the community's many members turn thrice daily to face in prayer. The Orthodox Union joins this brief.

The Women's League for Conservative Judaism ("WLCJ") is the voice of the women of the Conservative Movement, representing its membership at a wide array of national, international, religious and social action organizations. The mission of WLCJ is to strengthen and unite synagogue women's groups and their members, support them in mutual efforts to understand and perpetuate Conservative/Masorti

Judaism in the home, synagogue and community, and reinforce their bonds with Israel and Jews worldwide. WLCJ joins this brief in support of the Petitioner.

SUMMARY OF ARGUMENT

The Petitioner, an American citizen who was born in the western sector of Jerusalem, seeks nothing more than to identify his place of birth as "Israel" on his passport and Consular Report of Birth Abroad. The United States Congress, under whose statutory authorization the Secretary of State issues passports, enacted a statute which merely permits an American citizen born in Jerusalem to identify himself as having been born in "Israel"—not "Jerusalem, Israel," but simply "Israel."

The Secretary has refused to obey an Act of Congress instructing him to permit the Petitioner to identify his place of birth on his own passport as "Israel." He maintains that this statute, § 214(d) of the Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002) ("§ 214(d)"), unconstitutionally usurps what he asserts is the Executive Branch's exclusive power to recognize, or decline recognition of, foreign sovereigns. This is a power, he contends, that is implicitly granted exclusively to the Executive in Article II, § 3's grant to the President of the power to "receive Ambassadors and other public ministers."

Amici respectfully submit that § 214(d) simply authorizes a limited ministerial act. It permits an American citizen born in Jerusalem to identify his place of birth on his passport and Consular Record of Birth Abroad as "Israel." It does not usurp an exclusive power granted to the Executive Branch. The Secretary's position cannot, therefore, withstand scrutiny. Accordingly, *amici* urge the Court to reverse

the lower court decision and to permit American citizens falling within the ambit of § 214(d) to identify their place of birth in the manner provided by Congress.

ARGUMENT

I. THE PLAIN LANGUAGE OF § 214(d) ONLY AUTHORIZES A LIMITED, MINISTERIAL ACT

The only section of § 214 at issue here, subsection (d), provides simply that:

> (d) *For purposes of* the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the City of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel (emphasis added).

Section 214(d) does not constitute or purport to constitute a proclamation on the status of Jerusalem, or the United States' recognition of Jerusalem as the capital of Israel, or an announcement of any change in our Government's position concerning the status of Jerusalem. It is, on its very face, a limited provision. It allows United States citizens who were born in Jerusalem to request that, for the purpose of their own passport, they may record their place of birth as "Israel." Were there any doubt that this recording is solely for this limited purpose, the provision begins, "*For purposes of*." The permitted entry is allowed for a narrow purpose. The provision simply authorizes American citizens to identify their place of birth on their own passport and merely "record [their] place of birth as Israel."

Significantly, if the Secretary complies with § 214(d), nothing in Zivotofsky's passport will even *mention* Jerusalem, let alone recognize it as a city of—or the capital of—Israel. Indeed, the passport will be entirely silent concerning the particular city in which Zivotofsky was born. It therefore can in no way constitute a representation that the United States has taken any position about Israel's sovereignty over Jerusalem.

In short, this is an Act of the United States Congress that permits a limited number of American citizens who were born in Jerusalem to identify themselves on their own individual passports as having been born in "Israel." The statute operates solely "for the purpose of" permitting those citizens to record their own identity and place of birth on their own identity papers. It does not constitute a pronouncement of foreign policy. Congress made that plain in its drafting of the statute. The Secretary cannot seriously contend that this ministerial provision constitutes the "usurpation" of the Executive Branch's power to recognize the sovereignty of foreign governments, to express its position about the resolution of the Israeli-Arab conflict, or to conduct foreign policy.

II. THE SECRETARY BEARS THE BURDEN OF OVERCOMING THE PRESUMPTION THAT ENACTING § 214(d) WAS WITHIN CONGRESS' CONSTTTUTIONAL POWER AND OF DEMONSTRATING THAT IT "PLAINLY" HAS THE EFFECT OF "USURPING" A FUNCTION EXCLUSIVELY VESTED IN THE EXECUTIVE

Congress' authority to legislate concerning the issuance of passports is found in Article I of the Constitution. That body has been enacting statutes

governing passports since the founding of the republic. Accordingly, the sole issue presented is whether enactment of § 214(d) improperly usurped a power granted exclusively to the President by the Constitution. It did not.

The Secretary's claim that Congress' enactment of § 214(d) should be disregarded must be evaluated against the backdrop of: (1) the presumption that it is valid; (2) the Supreme Court's requirement that § 214(d) be construed, if at all possible, to avoid its invalidation; and (3) the Secretary's burden to demonstrate clearly that if § 214(d) is not invalidated, the Executive Branch's ability to conduct foreign policy will be "usurped."

A. Section 214(d) Is Presumptively Valid and Should Be Construed to Avoid Invalidation.

It has been said that the Court's duty to rule on the constitutionality of an act of Congress "is the gravest and most delicate duty that [it] is called upon to perform." *Blodget v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring) (Court's "plain duty" is to adopt the interpretation "which will save the Act," rather than one which invalidates it). The Supreme Court has repeatedly affirmed that courts are to proceed "on the reasonable presumption that Congress did not intend the [interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916), for the proposition that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is

unconstitutional, but also grave doubts upon that score").

As the Supreme Court has recently put it:

> Proper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass [the] act in question is clearly demonstrated.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)); *see also United States v. Morrison*, 529 U.S. 598, 607 (2000) (Court will "invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds") (emphasis added).

B. The Secretary Cannot Clearly Demonstrate That the Executive Branch's Ability to Conduct Foreign Policy Will Be "Usurped."

The Secretary bears the burden of demonstrating that § 214(d) actually "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)). It is the position of the United States that the final status of Jerusalem should be resolved through negotiation between Israel and its neighbors. *See* Remarks by President Barack Obama in Address to the United Nations General Assembly (Sept. 21, 2011), http://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly (last visited July 17, 2014) ("Ultimately, it is the Israelis and the Palestinians—not us—who must reach

agreement on the issues that divide them: on borders and on security, on refugees and Jerusalem"). The Secretary argues that § 214(d) impermissibly interferes with the Executive Branch's ability to conduct foreign policy in the Middle East and, in particular, with its ability to preserve its position that it does not recognize Jerusalem as the capital of Israel or, for that matter, as part of any polity.

This ministerial act could not constitute the "usurpation" of any exclusive powers of the Executive Branch to conduct foreign policy. The Department of State's own Foreign Affairs Manual ("FAM") defines a United States passport as "a travel document issued under the authority of the U.S. Secretary of State attesting to the *identity and nationality* of the bearer." 7 FAM 1311(b) (2013) (emphasis added). A passport "[i]dentifies the bearer as a U.S. citizen or non-citizen national." 7 FAM 1311(d)(2). An American citizen's passport serves as her or his "proof of U.S. citizenship and identity at home and abroad," 7 FAM 1311(f)(2), and entitles the bearer to be "recogni[z]ed, in foreign countries, as an American citizen." *Haig v. Agee*, 453 U.S. 280, 292 (1981) (quoting *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835)). An American citizen's passport, then, is not an expression of the foreign policy of the United States. Rather, it reflects the identity of an American citizen as set forth by that citizen, and nothing more.

Moreover, the "place of birth" designation by the American citizen cannot be said to constitute the Executive Branch's recognition, or non-recognition, of the sovereignty of a foreign government. Rather, as the Secretary's own FAM states:

> [T]he 'place of birth' designation is an integral part of establishing an individual's identity.

> It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of an emergency.

7 FAM 1310(g), App. D.[2]

Thus, a passport is not a statement of foreign policy, and it certainly is not a means of official recognition of a foreign government. Quite the contrary, a U.S. passport is a statement to foreign governments of a purely domestic matter, namely, that the bearer is a United States citizen. In a word, the United States passport serves "as proof of U.S. citizenship at home and abroad." 7 FAM 1311(f)(2). This limited role of the passport has been recognized by this Court. As was noted in *Haig v. Agee*, 453 U.S. at 292 (quoting *Urtetiqui v. D'Arcy*, 34 U.S. at 698), a passport is a document "by which the bearer is recogni[z]ed, in

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[2] Thus, for instance, requiring an American citizen born in Jerusalem to simply limit herself to identifying her place of birth as "Jerusalem," rather than "Israel," if she requests that self-identification, would consign her to a "no-man's land," in which she would be unable to have a passport which clearly identified her in the manner permitted other American citizens. This is because, in addition to Israel, there are nineteen (19) other countries that have locations named "Jerusalem." *See* Report of National Geospatial-Intelligence Agency, http://geonames.nga.mil/namesviewer/ (last visited July 17, 2014). In addition, there are twenty (20) places in the United States called "Jerusalem," located in twelve (12) different states. *See* Jerusalem-USA blog, http://jerusalem –usa.blogspot.com (last visited July 17, 2014).

foreign countries, as an American citizen"; *accord United States v. Laub*, 385 U.S. 475, 481 (1967).

It is not enough for the Secretary to simply assert that § 214(d) impermissibly interferes with the Executive Branch's power to recognize or refuse to recognize foreign sovereigns. Rather, it is his burden to demonstrate that Congress' provision actually and clearly "usurps" the Executive's power. "Usurp" is defined as "tak[ing] the place of by or as if by force; supplant." *Usurp*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/usurp (last visited July 17, 2014). As the Supreme Court has put it, "it must be obvious that there was a usurpation of functions exclusively vested in . . . the Executive." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). That congressional enactments simply touch upon the powers of the Executive will not suffice to render them unconstitutional. *See Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government . . . [A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.").

The Secretary's usurpation argument is also ironic given that it is Congress that authorizes the Secretary to issue passports in the first place—and it is the Constitution which provides Congress with the power to authorize the Secretary to do so. Congress empowered the Secretary to issue passports under the Passport Act of 1926, ch. 772, 44 Stat. 887 (1926). *See Zemel v. Rusk*, 381 U.S. 1, 7 (1965). Indeed, Congress retains the ability to enact new passport laws. *See, e.g.*, Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 127(a),

108 Stat. 382, 394 (1994) (amending the language "regulat[ing] the issue and validity of passports").

It is clear that the Executive does not have exclusive power to regulate the issuance of passports. Indeed, it is undisputed that Congress does have the power to enact passport legislation. Congressional authority to control entry and exit into the United States, and to authorize the Department of State to issue passports, derives from the Constitution, in particular, from the Commerce Clause. *See* U.S. Const. Art. I, § 8, cl. 3. *See also* U.S. Const. Art. I, § 9, cl. 1 (indicating that it is Congress that has the power to regulate "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 518 (1964) (Black, J., concurring) ("Without reference to other constitutional provisions, Congress has, in my judgment, broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations."). In short, the Secretary makes the claim that § 214(d) usurps the exclusive domain of the Executive Branch notwithstanding the fact that his own power to issue passports in the first instance comes from Congress, and Congress' right to grant him that power derives from the Constitution.

The Circuit Court below expressly acknowledged Congress' power to legislate in this arena. *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 216 (D.C. Cir. 2013). Respondent himself, by means of the Department of State Foreign Affairs Manual, expressly recognizes that his authority to issue, deny and revoke passports derives directly from congressional enactments, including 22 U.S.C. §§ 211a, 212, 213, 214, 214a, 217a, 218 and 2705. *See* 7 FAM 1318(a). This recognition is further demonstrated by the Manual's reference to

Executive Order 11295, which was issued on August 5, 1966 and sets forth rules governing the issuance of passports. The Manual describes that Executive Order as delegating "to the Secretary of State the authority to make regulations regarding passports *conferred on the President of the United States by 22 U.S.C. § 211a.*" 7 FAM 1318(a)(9) (emphasis added); *see Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1241 (D.C. Cir. 2009) (Edwards, J., concurring).

Indeed, both Respondent and the Court of Appeals acknowledge that, in fact, enactment of §214(d) did not effect any change whatsoever in United States policy regarding the status of Jerusalem. It is conceded that the President did not feel the need to veto the legislation, and, in signing the law, the President issued a statement expressly advising that the enactment did not reflect or effect any change in United States policy. This message was expressly reaffirmed by the U.S. Consulate in Jerusalem. *Zivotofsky*, 725 F.3d at 218. Thus, what Respondent and the Circuit Court are left arguing is that because some foreign interests in 2002 allegedly *misperceived* the nature and scope of the congressional enactment and confused a statute that simply permits American *citizens* to self-identify their own place of birth with a statement of policy by the American *government*, Congress' two-century-old authority to pass passport legislation must be negated as somehow constituting a "plain usurpation" of exclusive executive power.[3]

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[3] There is no evidence suggesting that since their initial misperception at the time of the enactment of § 214(d) in 2002, any foreign ministers continue to labor under this misunderstanding as to the true nature and scope of the statute. Indeed, and as the Court of Appeals recognized, not a single Palestinian

Amici are unaware of any authority holding that our nation's constitutional jurisprudence may, or should, turn on "criticism" from interested factions abroad, especially when that criticism is, as the Court of Appeals notes, mistaken. Surrender of the rights of U.S. citizens to express their views—the purpose of § 214(d)—and negation of Congress' authority to act in a sphere that has long been recognized as falling within its powers, cannot be the acceptable solution. No doubt many foreigners are "critical," for example, when they see Americans on federal property protesting White House policies which those foreigners find favorable to their viewpoint. The solution cannot be to curtail the protest rights of citizens in the name of securing the foreign policy powers of the Executive. Numerous avenues are available to the Respondent to counter any mistakes by foreigners as to what a particular statute does or does not mean, including even recording in the passport itself that the ministerial act of honoring a request by a Jerusalem-born American citizen to identify Israel as his birthplace does not change the position of the United States with respect to Jerusalem.

Thus, § 214(d) should be presumed Constitutional and the Secretary cannot meet his burden to "clearly demonstrate[ ]" that § 214(d) usurps the Executive Branch's power to recognize foreign sovereigns.

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or Arab interest group submitted an *amicus curiae* brief in this matter. *Zivotofsky*, 725 F.3d at 219.

III. THE SECRETARY'S ASSERTION OF INTERFERENCE WITH EXECUTIVE POWER IS BELIED BY HIS OWN ESTABLISHED WRITTEN POLICIES AND PROCEDURES

Article II, § 3 grants the President the authority to "receive Ambassadors and other public Ministers." Respondent contends that this power implicitly includes the exclusive power to recognize or to decline recognition of foreign governments.[4] Any conflict with this asserted power posed by a citizen born in Jerusalem claiming Israel as his or her birthplace relies on erroneous speculation on third parties' part. To the extent that mistaken speculations risk interference with the Executive Branch's exercise of its powers, the State Department already permits individuals in other disputed territories to express views through the birthplace entry at odds with the official position of the United States government and has demonstrated the ability to avoid any confusion. The State Department also acknowledges Congress' authority, if it chooses, to eliminate the birthplace entry from passports entirely. As such, § 214(d) does not interfere with executive power.

A. Interpreting a Passport's Reference to Israel As the Birthplace of an Individual Born in Jerusalem As a Recognition of Sovereignty Requires Erroneous Speculation That Can Be Easily Avoided.

The Secretary asserts that if he permits American citizens born in Jerusalem to identify their place of birth in their individual passports as Israel, the

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[4] This assumption of implicit, exclusive power is contested by Petitioner and other *amici*.

Executive Branch's ability to conduct foreign policy in the Middle East will be usurped. This assertion, by which the Secretary seeks to invalidate an act of Congress, is based on speculation that if Jerusalem-born American citizens are allowed to claim Israel as their birth country on their United States passport, protests in the Middle East will interfere with American foreign policy. This is not only speculation, but, indeed, speculation that there will be some in the Middle East who will *mistakenly* conclude that simply permitting individual American citizens born in Jerusalem to record their place of birth as Israel reflects a change in American policy about the status of Jerusalem, when it does not.

Even assuming that some would reach this mistaken conclusion, and further assuming that this mistaken conclusion would be meaningful to some, the United States can easily remedy the mistaken assumption. It can do so by announcing, or noting, or even recording in the passports in question, that the ministerial act of honoring a request by a Jerusalem-born American citizen to identify Israel as his birthplace does *not* change the position of the United States with respect to Jerusalem, or in any way constitute the United States' recognition of Jerusalem as the capital, or as even part, of Israel.

B. The United States Has Successfully Clarified That Passport References to Other Disputed Territories Do Not Constitute Recognition of Sovereignty.

The Secretary's treatment of Taiwan-born American citizens illustrates the point. The Secretary complies with an analogous congressional enactment concerning Taiwan-born American citizens. Congress enacted § 132 of the Foreign Relations Authorization Act,

Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382, 395 (1994) as amended by Pub. L. 103-415, § 1(r), 108 Stat. 4299, 4302 (1994), requiring the State Department to permit American citizens born on the island known as Taiwan to identify their place of birth as "Taiwan." Congress instructed the Secretary to permit American citizens to make this request despite the fact that the United States recognizes the People's Republic of China as the sovereign over this territory. China strenuously objected to this legislation and its government refused to endorse visas in passports listing Taiwan as the place of birth. *See US Rule Allowing "Taiwan" As the Birthplace on US Passports "Totally Unacceptable,"* BBC Summary of World Broadcasts, July 27, 1995 (quoting July 27, 1995 Statement of the Consulate-General of the People's Republic of China in New York: "[T]his naturally is totally unacceptable to the Chinese government. For this reason, the Chinese government has lodged a strong protest with the U.S. Government"). The State Department nonetheless followed the congressional mandate, without any apparent impact on the Executive Branch's recognition power.

The State Department Manual's instructions regarding the recording of the place of birth for Taiwan-born American citizens state:

> (6) Taiwan:
>
> > (a) Public Law 103-415 (1994) provided that the Secretary of State may write "Taiwan" as place of birth in a passport, when requested to do so by applicants born there.

7 FAM 1340(d)(6)(a), App. D. This provision in the FAM is immediately followed by a "note" highlighted in a box, which is replicated below.

> NOTE. The United States does not officially recognize Taiwan as a "state" or "country" although passport issuing officers may enter "Taiwan" as a place of birth. (See also 7 FAM 1340 Appendix D(6)(f)).

Id. note, App. D. The circumstances surrounding the enactment of Public Law 103-415 (involving Taiwan) were considerably more likely to suggest a claim of "usurpation" than the instant ones surrounding § 214(d) (involving Israel). The United States *does not* recognize Taiwan as a sovereign, but instead recognizes another polity as the sovereign of that territory. By contrast, the United States *does* recognize Israel and, indeed, permits American citizens born in other parts of Israel to record their place of birth as Israel. *See* 7 FAM 1360(e), App. D. Unlike Taiwan, the United States does not recognize another polity as sovereign of Jerusalem.

The Secretary has not put forth any reason, let alone a compelling one, why he cannot do in the case of § 214(d) what he does in the case of Public Law 103-415. In order to avoid any confusion or misunderstanding, the Secretary may note in the State Department's FAM that the United States does not recognize Jerusalem as the capital of Israel, or that it regards the status of Jerusalem as subject to final status negotiations, or that adhering to § 214(d) in no way changes American foreign policy. He may issue a formal announcement, thereby ensuring that no one should mistakenly conclude otherwise. He may even include a "footnote" in the particular passport so stating. In sum, the Secretary's compliance with

Public Law 103-415, and the Department's own FAM clarifying that entering a place of birth in compliance with a citizen's wishes does not change United States policy, eviscerates his claim that § 214(d) usurps the Executive's power to recognize sovereigns.

C. A Citizen May Protest the United States' Official Recognition of Sovereignty by Indicating a City of Birth Instead of a Country of Birth on His or Her Passport.

Respondent already recognizes that the place of birth entry is not a statement of official United States policy or recognition. Within the passport document itself the citizen is already free to state his or her objection to that policy by rejecting the sovereignty of the country as recognized by the President and insisting that only the city of birth be shown in the passport.

Absent such an objection from the citizen, the place of birth entry in the passport for citizens born abroad would always (and only) state the country which the President has recognized as having sovereignty over that city. *See* 7 FAM 1310(f), App. D. For example, the passport of a citizen born in Kiev will only identify him as having been born in Ukraine. Thus, by stating, at the citizen's insistence, only the city of birth—as the Manual expressly permits—there is the exact same risk that a foreign sovereign in that instance could conclude that the President has "changed" foreign policy with respect to sovereignty as is present if a citizen born in Jerusalem were to be permitted to identify himself as being born in Israel. (Indeed, there is likely less of a "risk," since there would be no obvious reason to conclude that a person listing Israel as his

place of birth was necessarily born in Jerusalem, whereas a passport listing "Kiev" as the place of birth would of necessity be inconsistent with the President's recognition of Ukraine's sovereignty.) Precisely because Respondent has already determined that in the former case there is no interference with the President's power to recognize foreign governments and that citizens will be allowed to express such objection—just as citizens born in Taiwan may do—there is no basis for concluding that the Congress cannot afford a similar right to citizens born in Jerusalem, as it has in fact done by § 214(d).

Indeed, given that at 7 FAM 1380(a), App. D Respondent already more broadly affords citizens who object to an actual presidential decision on recognition the right to instead insert different identifying information in the place of birth entry, *a fortiori* there can be nothing unconstitutional about § 214(d), which affords citizens the right to insert Israel as their place of birth where the President had admittedly not yet even formulated an official view on the status of Jerusalem. *See Zivotofsky v. Sec'y of State*, 571 F.3d at 1228.[5]

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[5] The Court of Appeals' decision also acknowledges the substantial evidence presented by Petitioner and other *amici* demonstrating that the State Department itself has occasionally issued passports with "Israel" as the place of birth to citizens born in Jerusalem, created records referring to "Jerusalem, Israel" and maintained various websites referencing "Jerusalem, Israel," all without any apparent harm to the nation's foreign policy interests. *See Zivotofsky*, 725 F.3d at 218-19.

D. The State Department Acknowledges That Congress May Eliminate the Place of Birth Entry Altogether and Recognizes That It Has Chosen to Retain It for the Convenience of Travelers.

In fact, the Foreign Affairs Manual indicates that deletion of the place of birth entry entirely from the passport is a matter that "has been discussed extensively among U.S. Government agencies and with the Congress," 7 FAM 1310(g)(4), App. D, and that Congress commissioned studies on the issue.

Thus, Respondent recognizes that Congress has legitimate authority over the question of what information need be entered in the place of birth entry, or even whether any information at all need be designnated. The Manual notes that after extensive analysis, it was determined to retain the place of birth entry as an element of the passport. This was done, however, not so that the Executive can make or advance policy statements regarding the recognition of foreign sovereigns, but rather to avoid inconvenience to U.S. citizens traveling abroad, since a number of countries would still require travelers to provide place of birth information. 7 FAM 1310(g)(4)(c).

In sum, the place of birth entry on the passport does not exist as a means of expression of United States policy on the recognition of foreign governments—the very limited matter which Respondent asserts the Constitution delegates exclusively to the President. Instead, the place of birth designation exists solely as an additional means for the citizen to provide identifying information about himself that can help differentiate him from similarly named persons or from individuals with the same date of birth.

Respondent recognizes that the citizen could either include such information as part of his passport or he could provide that information separately upon arrival at his place of foreign destination. In either event, it is the citizen who is making the statement. The determination has been made to include the information in the passport, but that decision was made only for the convenience of U.S. citizens traveling abroad and to help differentiate the particular citizen from other U.S. citizens.

IV. SECTION 214(d) REMEDIES A REGIME WHICH EFFECTIVELY DISCRIMINATES AGAINST AMERICAN CITIZENS BORN IN JERUSALEM, AND, THEREFORE, INVALIDATING § 214(d) WOULD EFFECTIVELY REINSTATE THAT DISCRIMINATORY REGIME

Section 214(d) serves to remedy a regime that discriminated against Jerusalem-born American citizens who wished to identify their place of birth as Israel. Invalidating § 214(d) would reinstate that discriminatory regime. If § 214(d) is overturned, Jerusalem-born American citizens who wished to identify their place of birth as Israel would be deprived of the right to identify their place of birth on their passport as they desire. This is a right presently accorded to American citizens born in territories not even recognized by the United States. For this additional reason, *amici* respectfully submit that this Act of Congress should be upheld.

The Secretary's FAM provides that "[a]s a general rule, the country that currently has sovereignty over the actual place of birth [of an American citizen] is listed as the place of birth, regardless of where the birth occurred." 7 FAM 1330(b), App. D. The

Secretary departs from the rule—without any adverse impact, evidently, on the Executive's exclusive power—for citizens *other than those born in Jerusalem*. As noted, American citizens born in Taiwan, which the United States does not recognize, and over which the United States recognizes that the People's Republic of China has sovereignty, are nevertheless permitted under the FAM to record their place of birth as "Taiwan."

Even with respect to the very land which the Secretary argues requires the invalidation of § 214(d), the Secretary maintains very different rules for those who object to identifying Israel as their birthplace on their passports. United States citizens born in what is presently recognized by the United States as Israel who *object* to having their place of birth recorded as Israel may *refuse* to list their place of birth as Israel. However, some may identify their place of birth as "Palestine," a country not recognized by the United States. By contrast, those who are born in Jerusalem—even West Jerusalem, like Zivotofsky—who wish to record their place of birth as Israel may not do so, unless § 214(d) is upheld.

The Secretary's FAM provides in pertinent part:

> An applicant born in the *area formerly known as Palestine* (which includes the Gaza Strip, the Golan Heights, Jerusalem, or the West Bank) *may object to showing the birthplace*. In such cases, [the government employee should] explain the Department of State (CA)'s general policy of showing the birthplace as the country having present sovereignty. The Senior Passport Specialist, Supervisory Passport Specialist, or Adjudication Manager at a domestic passport

> agency or center or supervisory consular officer or regional consular officer at a U.S. embassy or *consulate may make an exception to show PALESTINE as the birthplace if the applicant was born before 1948. If the applicant was born in 1948 or later, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty.*

7 FAM 1360(g), App. D (emphasis added). In short, an American citizen born in Tel Aviv, or Haifa, or anyplace else in what the United States recognizes as Israel, but who objects for political reasons to listing his place of birth as Israel, is entitled to either list his place of birth as "Palestine," or, in any event, *not* have his place of birth listed as Israel—even though it is Israel which has sovereignty over that city of birth. In such cases, the Secretary permits that citizen to self-identify in a way that contradicts both the Executive's recognition of Israel and the FAM's general rule. However, *Zivotofsky*, born in Jerusalem, would *not* be able to identify his place of birth as Israel if § 214(d) is invalidated.

The Secretary's position concerning American citizens born in Taiwan, and American citizens born in what the Secretary recognizes as Israel but who do not wish to identify as having been born in Israel, cannot be reconciled with his position that § 214(d) is an impermissible usurpation of executive power. To the contrary, these provisions demonstrate that § 214(d) does *not* constitute a usurpation of the Executive. Moreover, permitting the Secretary's position with respect to American citizens born in Taiwan and American citizens born in Israel who do not wish to be identified with Israel to stand, while invalidating

§ 214(d), would discriminate against Jerusalem-born American citizens who wish to identify their place of birth as Israel. As such, invalidating a statute which effectively remedies this discriminatory regime would be wrong for this additional reason.

CONCLUSION

The statute at issue here is well within the powers of the Congress—long acknowledged by both this Court and Respondent—to regulate the issuance of passports and other government documents. Section 214(d) does not impermissibly usurp the Executive's power to recognize foreign governments. Passports and other government documents generally, and the place of birth entry in particular, concern the identity of the bearer and his or her status as a U.S. citizen rather than serving as a platform for the expression of foreign policy pronouncements coming within the exclusive jurisdiction of the President. Respondent's Manual and the actual practices of the State Department recognize that citizens do have the right to state their views regarding their place of birth identification in a manner inconsistent with the official recognition policies of the Executive, demonstrating that the rights afforded to citizens born in Jerusalem by § 214(d)—like the rights granted to citizens born in Taiwan—do not constitute an infringement upon the duties assigned by the Constitution to the President. Accordingly, it is respectfully submitted that this Court should find that § 214(d) is not an unconstitutional enactment.

For the foregoing reasons, and in addition to those set forth by the Petitioner, *amici* respectfully submits that judgment should enter in favor of the Petitioner.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENT

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondent in Case 13-628 ("*Zivotofsky*").[2] Amicus was gratified to see that in another case touching on foreign policy, *Bond v. United States* (134 S. Ct. 2077 (2014)), the Court did not overturn 18 U.S.C. § 229 (1998) (re chemical weapons) or the venerable case of *Missouri v. Holland* (252 U.S. 416 (1920)), especially since his amicus brief, *see id.*, for Respondent in *Bond* asked for them to be preserved.[3] Similarly, here, the Executive's foreign-policy stance has for decades respected an international consensus about the status of Jerusalem, and there is no need to fix what is not broken.

Additionally, Amicus is an American taxpayer and, respectfully said, does not want his money spent supporting Zivotofsky's desired message. While parties pay for their own passports, Amicus' tax money pays for the State Department's operations, including any passport-printing facilities. Amicus sees petitioner's declaration of Israeli ownership of Jerusalem as hurting American

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Amicus received permission from the parties to write a brief, permission which will be sent to the Court.

[2] *Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky, v. John Kerry, Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013) (*cert. granted*, 82 U.S.L.W. 3609).

[3] Amicus also notes with pleasure the Court's citing in *Bond* of a John Singer Sargent painting, 134 S. Ct. at 2083.

interests and making undesirable results, even terrorist attacks against Americans, more likely.

SUMMARY OF ARGUMENT

Millennia of dispute over the Mideast and Jerusalem counsel a careful and fair approach to ownership of Jerusalem.

If that the power to recognize foreign nations is somehow not exclusively the Executive's, the Executive may still hold the preponderance of recognition power, or the power to "break a tie" if there is disagreement.

Congress should not delegate the recognition power to a private citizen.

The "Receive Ambassadors Clause", U.S. Const. art. II, § 3, cl. 4, supports Respondent's case.

A balance-of-sorts or *modus vivendi* has existed where Congress has its sphere, e.g., foreign commerce, whereas the Executive has largely controlled recognition. It would disrupt that balance to remove, or gut, the Executive's recognition power.

Letting Petitioner have his way may violate the spirit of the Logan Act (1 Stat. 613 (1799), codified at 18 U.S.C. § 953).

Petitioner's argument may not treat Palestinians and Israelis by equal standards.

Amicus shall offer refutations for Petitioner's amicus briefs.

The Nation's interests, but also Israel's long-term interests as well, and the interests of the world, are compellingly served by letting the Executive, not private individuals, administrate passports.

ARGUMENT

I. SOME BACK HISTORY OF THE MIDDLE EAST, AND ITS CONSEQUENCES FOR THIS CASE

There has been turmoil in the Middle East for some time. *See, e.g.*,

> About this time war broke out in the region. . . .
>
> The kings of Sodom, Gomorrah, Admah, Zeboiim, and Bela formed an alliance and mobilized their armies in Siddim Valley (that is, the valley of the Dead Sea). For twelve years they had all been subject to King Kedorlaomer [of Elam], but now in the thirteenth year they rebelled.
>
> One year later, Kedorlaomer and his allies arrived. They conquered the Rephaites in Ashteroth-karnaim, the Zuzites in Ham, the Emites in the plain of Kiriathaim, and the Horites in Mount Seir, as far as El-paran at the edge of the wilderness. Then they swung around to En-mishpat (now called Kadesh) and destroyed the Amalekites, and also the Amorites living in Hazazon-tamar.

Genesis 14:1-7 (New Living Translation). This passage, *see id.*, nicely shows the diverse, violent, and complex pageant and chronological depth of Middle-Eastern history, including the "Zuzites in Ham"—whoever *they* were, God rest their memory—and the always-fascinating Sodom and Gomorrah.

One inadvertent punchline is "(now called Kadesh)", *id.*; the "now", *id.*, was current back then, but, ironically and poignantly, is ancient at this point, compared to our present "now". Given all this complexity and depth of "backstory", perhaps the State Department and its foreign-policy professionals, under the Chief Executive and his Article II powers, may be better placed to make decisions about controversial details of Middle-East-related passports than the politicians of the Legislative Branch are.

More recently than the Zuzites of Ham, there was the Latin Kingdom of Jerusalem (c. 1099-1291) under its first leader Godfrey of Bouillon (he modestly refused to call himself "King", it is said), that famed Frankish knight of the First Crusade.[4] Jerusalem, and the rest of the Abrahamic religions' "Holy Land", was in dispute, as battle raged, and the Crusaders cried *Deus le Vult!* ("God wills it"), and Saracens shouted *Allahu akbar!* ("God is great"). Those days of adventure and chivalry, of Saladin and Richard the Lionheart, are long gone; unfortunately, many of the same disputes and bloodshed are still here.

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[4] Wikipedia, *Kingdom of Jerusalem*, http://en.wikipedia.org/wiki/Kingdom_of_Jerusalem (as of 00:46 GMT, Sept. 21, 2014).

To Godfrey of Bouillon, it may have been "obvious" that the God of Israel in the flesh, Jesus Christ, gave His elect Christian people dominion over that region around Jerusalem where He was crucified. By contrast, many Jewish believers may have felt—and still feel—that per Judaism, Yahweh has specially chosen *them* to dominate the region. And some Muslims may think Allah, in His bounty, has given *them* a preferred place over those lands. Who is right?

Given the thousands of years of contending claims, including both the religious ones *supra* and also ethnic or nationalist claims, perhaps sharing the region in an equitable way among various parties may be the best solution. And that includes equitably sharing Jerusalem, instead of letting Israel unilaterally assimilate it.

Such sharing of Jerusalem chimes with our American tradition since President Truman of regarding Jerusalem as not being Israel's territory. To allow an eleven-year-old boy, petitioner Zivotofsky, to have more foreign-policy power than the President does in the area of deciding how a U.S. passport describes the ownership of Jerusalem, is not a good idea.

II. THE EXECUTIVE NEED NOT POSSESS EXCLUSIVE RECOGNITION POWER IN ORDER FOR RESPONDENT TO HAVE POWER OVER PETITIONER'S PASSPORT RE JERUSALEM

A. Nonexclusive, yet Preponderant, Presidential Power over Recognition

If the President and the State Department, as part of the Executive, have exclusive recognition power, then that is that, basically, as for this case.[5] (Some may argue that Petitioner's designation of birthplace somehow does not involve the recognition power; but that is a difficult, even desperate, argument to make. If a Russian passport described a Russian citizen who was born in Alaska as being born in "Trans-Bering Sea East Russia"—as if Alaska were still Russian territory instead of American—, that would obviously be a problem, and a recognition problem at that.)

But even if the Executive somehow lacks *exclusive* recognition power, that does not mean that Respondent loses this case. For example, even if Congress is somehow ceded a quantum of recognition power by this Court (and that power might be more appropriate to the Senate, by the way—since the Senate helps make treaties—, than to the House of Representatives), that does not mean that the President does not possess a larger quantum, a "majority share", of that recognition power. Such a larger quantum would befit the President's widely-acknowledged prerogatives in foreign affairs. (State dinners are held at the White House, after all, rather than at the Capitol.)

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[5] This case revolving, naturally, around the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (§ 214(d), 116 Stat. 1366), and George W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers (Sept. 30, 2002).

B. Who Breaks a Tie, if the President and Congress Disagree on Recognition Issues?

And even if the Executive's "preponderant recognition power" *per se* did not exist (after all, Congress might find it offensive to hear that Congress has "inferior recognition power" that is labeled as such), there still could be such power *de facto*, that is, if the President is recognized to have the power to "break a tie" in case the Executive and the Legislature disagree on recognizing a foreign power or territory.

"Breaking a tie" sounds inelegant, perhaps, but it may be an accurate way to describe the situation. After all, *vis-à-vis* treaties, if the President and the Senate disagree on making a treaty, then the treaty will simply not be made. But passports, unlike treaties, essentially have to be issued, on an ongoing basis, to many people. For birthplace, to leave the space blank, or to put "NOTICE: THE AMERICAN GOVERNMENT CANNOT DECIDE WHAT TO PUT HERE', would be embarrassing. So who breaks the tie if there is a tie?

An aleatory method such as rolling dice would not suffice. So allowing one side to be the tiebreaker makes sense. And since the President and State Department have traditionally decided about birthplaces on passports, it makes sense to allow the Executive to decide in case of a "tie", a disagreement with Congress.

Note that this would not be just a euphemism for giving the Executive exclusive recognition power. If only the President had recognition power, then Congress could never wield any such power. But if

Congress had a quantum of recognition power, then the President could simply accede to what Congress' recognition decisions, if he or she liked, unless in cases of particular importance to the President. And arguably, this is what has happened historically. (I.e., Congress may have tried to recognize various nations, and the President may have acceded to it in various cases.)

The Executive breaking a tie even within the Congress is part of our constitutional tradition, after all. The Vice President breaks ties within the Senate, even on domestic issues, *see* U.S. Const. art. I, § 3, cl. 4. Then, it is not hard to imagine that when foreign policy is involved, and the Executive's own recognition power is involved, that the Executive may have a tie-breaking power, *per se* or *de facto*, in recognition issues where there is disagreement with Congress.

III. INSTEAD OF MAKING A CLEAR STATEMENT OF RECOGNITION OF JERUSALEM AS ISRAELI, CONGRESS MAY HAVE UNLAWFULLY DELEGATED THAT TASK TO PETITIONER

Looking at recognition issues from another angle: an additional problem is that instead of making a clear statement of recognition of Jerusalem as Israel's property, Congress has delegated this to be the choice of Menachem Zivotofsky or similarly-situated individuals. However, if Congress really has the power to recognize Jerusalem as Israeli, that does not mean that it has the right to delegate that to a private citizen.

After all, Petitioner seems to admit that the Executive may have some recognition power, *see* Pet'r Br. *passim*. Even if 214(d) was signed into law, and technically met requirements of "presentment", that was done so on the Executive's understanding that a signing statement would allow the President not to enforce 214(d). So, in terms of intent, "presentment" has not really been satisfied, since Presidents since Truman have never agreed to violate the world's understanding about Jerusalem's status, and since, therefore, the President's recognition power has not been used to validate 214(d).

"Improper delegation" may of course refer to an illegitimate delegation to another branch of government, e.g., if Congress offered to let the Chief Justice perform the tasks that the Speaker of the House usually does. In the instant case, where Congress delegates to Petitioner the so-called "right" to label his birthplace "Israel", a *reductio ad absurdum* example or two, following, may clarify why delegation to a private citizen can be a bad idea.

Say that Congress, instead of declaring war, decides to let citizen Joe Blow do it instead, and delegates the power to him by creating a statutory "right" for this to happen. However, it is not for Blow to decide whether America strikes a blow against an enemy through declaration of war; this is Congress' job, not his.

Or, say that instead of outright repealing the Logan Act, Congress says that each citizen may *decide for himself* whether he is violating the Act or not. This sort of "bill of attainder in reverse", making a citizen a perpetual judge in his own case,

resembles what is happening with 214(d). It is not up to each citizen to make his own foreign policy, especially when he does so by using a state document like a passport.

Amicus even recalls seeing "buzz" somewhere on the Internet (where, he does not recall), to the effect that with 214(d), Congress is basically "pussyfooting" around the issue of recognizing Jerusalem as part of Israel. Amicus thinks there is a large grain of truth in that. 214(d) has a whiff of "Let George do it" (or in this case, "Let Menachem do it"), putting responsibility for the dangerous maneuver of declaring Jerusalem to be Israeli, onto individual citizens who feel like declaring that status on their passports. Those citizens' declarations could constitute a "thin end of the wedge", "toe in the door", or "facts on the ground" that might eventually make it more easy for Congress to eventually recognize Jerusalem as Israel's, while throwing their hands in the air and saying, "Well, we're just following what all these individual citizens have decided on their passports, there's nothing we can do about it now, it's not *our* fault."

But that would be unethical or irresponsible. If Congress wants to recognize Jerusalem as part of Israel, it should do that outright. Then there might not be any "passport problem" *per se*: people would just put "Israel" on their passport if born in Jerusalem. Or if Congress wants to follow the Executive's lead and not recognize Jerusalem as being Israel's, they can do that too. What is likely unacceptable is for Congress to waffle about it and delegate this crucial foreign-policy decision to the

whim of particular Americans, instead of having the determination to make the decision themselves.

"Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

(Naturally, Amicus is not saying that if Congress did make a clear statement in a law that they passed, saying that Jerusalem is part of Israel—whether mentioning passports or not—, that that would be valid; after all, the President might not approve.)

All that being said: if the Court does not want to decide about the site of the recognition power itself, i.e., decide about whether the President has it, or Congress, or both: the Court can simply decide that the *ultra vires* delegation of the Jerusalem-recognition choice to Petitioner, is itself illegal, and that that alone is needed to decide the case in favor of Respondent.

IV. THE CONSTITUTION MAY GIVE THE PRESIDENT THE POWER, NOT MERELY THE DUTY, TO RECEIVE AMBASSADORS, OR NOT, WITH ALL THAT IMPLIES

But if the Court desires to inquire further into issues besides non-delegation ones: Petitioner's brief tells us, *id.* at 27, "The President is merely assigned the ceremonial duty of receiving foreign ambassadors." However, re the "Receive Ambassadors Clause", i.e., "he shall receive Ambassadors and other public Ministers", U.S. Const. art. II, § 3, cl. 4, the Constitution does not openly call this a duty (much less a "ceremonial"

one), and lists it among the dignities of other presidential *powers* such as adjourning Congress, *see id.* cl. 3, or the duty-which-is-also-a-power, "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient[.]" *Id.* at cls. 1-2 ("State of the Union" and "Recommendation" clauses).

Note the "shall" in the two clauses just mentioned, which does not preclude the duty from also being a power (i.e., the President can say what he likes); this means that the "shall" in the "Receive Ambassadors Clause" may, similarly, not denote or connote a mere duty, but may allow for real power and choice.

This all makes it rather unsupportable to automatically call receiving ambassadors a mere "duty" If it were only a mere errand, then the President would be reduced to an errand boy (or girl), a sort of fancy clown in white tie who has to smile and wave and entertain foreign ambassadors, whether at a state dinner or otherwise, while the Congress does all the really important work of choosing of what foreign nations will even be recognized. This seems unbalanced.

Without that textual hook, the "Receive Ambassadors Clause", Petitioner would have a stronger argument. However, that textual hook has existed since the 18th Century, and Petitioner's argument suffers greatly thereby.

Theory aside, there are also real-life equities to consider. For example: practically speaking, if the President makes a stupid or offensive recognition decision, then he and the State Department and

Foreign Service will have to pay for it shortly—a sort of "instant karma", as John Lennon put it—, since they, not Congress, will tend to be the ones personally dealing with foreign leaders. By contrast, if Congress makes a flawed or destructive decision, they leave the President and diplomats "holding the bag" when those latter persons have to deal directly with an angry world. This does not seem fair.

(Picture a state dinner with Arab leaders, if, earlier in the day, following an Israeli annexation of the West Bank, the Congress recognizes the West Bank as Israel's property, ignoring the President's wishes. If the President could not announce at that dinner that he is declining to honor Congress' advisory resolution, then he might be in for a very unpleasant dinner—and the Nation in for some very rough times.)

V. ALLOWING CONGRESS TO TRUMP THE PRESIDENT ON RECOGNITION ISSUES CREATES UNJUST IMBALANCE BETWEEN THE TWO BRANCHES, AND THE POTENTIAL TO HARM THE NATION

This case, by the way, is about more than just passports. The Congress has so many foreign policy powers, whether over declaring war (Art. I, § 8, cl. 11), or foreign trade (Art. I, § 8, cl. 3), etc., that to give Congess full recognition power as well would cause imbalance in our government, redolent of the remark, "The legislative department is everywhere extending the sphere of its activity, and drawing all

power into its impetuous vortex." *The Federalist No. 48* (James Madison).[6]

There may be some "*de facto* recognition power" in things like war declarations, trade, and other matters that Congress handles. However, the *per se*, formal recognition power should belong to the Head of State, or at least the power to decide formal recognition in case Congress disagrees.

All of America's People elect the President to be Head of State—perhaps implying in itself that he or she should be the one to recognize foreign States—, whereas no one has elected people born in Jerusalem to be the deciders of recognizing a foreign power.

The President is "the sole organ of the federal government in the field of international relations", *United States v. Curtiss-Wright Export Corp. et al.* ("*Curtiss-Wright*"), 299 U.S. 304, 320 (1936) (Sutherland, J.). Not a mere "sole instrument", but the "sole organ". His the voice and the final choice over formal recognition, lest he be considered the mere puppet or ventriloquist's dummy of Congress. As the person responsible for meeting foreign heads of state, he should be the one to deal with the delicatesse and politesse of making formal recognition, as is implied in a passport birthplace. Congress micromanaging passports to the point where they can interfere with birthplace issues when they infringe on the Chief Executive's recognition power, is intrusive and usurpatory.

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[6] *Available at* About.com, US Government, http://usgovinfo.about.com/library/fed/blfed48.htm.

Frankly, formal recognition could be considered a paltry little power, compared to declaring war, or managing trade, etc. But this is one reason why, for sake of balance, the President should retain it. If he does not even have that, he is not much of a "sole organ", or not much of anything. (By the way, protecting this Nation from disastrous foreign policy mistakes that could get Americans killed is a "constitutionally assigned function" of the President, Amicus believes, if we are looking for "constitutionally assigned functions".)

Admittedly, there is still some constitutional confusion about all these issues. However, if the Court can newly recognize its own supremacy *vis-à-vis* other branches in a particular aspect, *see Marbury v. Madison*, 5 U.S. 137 (1803) (establishing judicial review), it should be able to newly recognize another branch's supremacy (the President's in making the final call in formal recognition), as in the recognition issues of long debate, but first impression, that we are examining.

Curtiss-Wright mentions, as partially noted *supra*, "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress", *id.* at 320 (Sutherland, J.). Thus, the President has "plenary and exclusive power" on his own, *see id.*[7] The famed

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[7] Just as in the 1930's this Court shifted to a new frame of mind about economic legislation, *see, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), they also may have done so *vis-à-vis* foreign policy, which comprises the recognition power.

Jackson concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) says, though, *see id.* at 635 n.2, that *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." But that flatly contradicts what Sutherland says about "plenary and exclusive power" *supra*, and Sutherland wrote the Court's opinion (dicta or not), not a mere concurrence. (Amicus also notes that Jackson says, "Courts can sustain exclusive presidential control in such a case [Congressional disapproval] only by disabling the Congress from acting upon the subject." 343 U.S. at 637-38. But as Amicus has pointed out, the President may need only tie-breaking power, not exclusive power, to have the last word in recognition disputes.)

Debate will continue, but for now, Amicus notes that in *Youngstown*, *supra*, and *Medellín v. Texas*, 128 S. Ct. 1346 (2008), largely the outlier effects of foreign-policy or Commander-in-Chief powers were being considered, i.e., steel plants in *this* country, not abroad, and the execution in this country (not abroad) of a Mexican national. These situations differ greatly from the instant case, because while

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Curtiss-Wright may reflect a judgment by the Court that in the modern world, and the increasingly difficult international atmosphere of the 1930's, with the specter of Nazism, etc., that more reliance should be placed on presidential power in foreign affairs (e.g., the Receive Ambassadors Clause), instead of showing laxness and letting the Congress have powers (e.g., the recognition power) that more properly belong to the President, who can often act more quickly and effectively in foreign affairs than Congress can.

214(d) is a law in this country (and *Medellín*, *supra*, is not fond of the President acting as a domestic legislator, *see id. passim*), 214(d)'s effects are felt abroad, with a passport declaration of "Israel" instead of "Jerusalem" being a calling-card of a most unwelcome kind in many places. The President should be able to make that calling-card one which does not endanger American interests.

VI. ALLOWING PETITIONER TO DECIDE RECOGNITION ISSUES IN HIS OWN PASSPORT MAY VIOLATE THE SPRIT OF THE LOGAN ACT

The Logan Act, *supra* at 2, prevents, *see id.*, private citizens from making U.S. foreign policy. While Petitioner doubtless means well, it strikes Amicus that it would violate at least the spirit of the Logan Act to allow Petitioner, instead of the President, to make a recognition decision about Israel in his passport, one that would harm American interests.

(Incidentally, Amicus notes here that the sensitive expertise of a permanent diplomatic corps, the Foreign Service and State Department—including people who may actually speak fluently some of the languages of the Middle East such as local dialectal forms of Arabic, Hebrew, or Farsi—, may be a factor to consider in this case, instead of just the vagaries of American domestic politics resulting in things like 214(d). A corps of trained specialists may, arguably, know more about a complex issue than does a politician who has to be reelected every two years.)

VII. THE DIFFERING TREATMENT OF PALESTINANS AND ISRAELIS IN PETITIONER'S BRIEF

It also harms American interests to seem inequitable. Petitioner's brief says of Jerusalemites (who will probably be Israeli in the scenario about to be mentioned), "To these Americans, personal dignity and conscientious conviction calls on them to identify themselves as born in 'Israel.'" Br. at 16.

However, of Palestinians who do not want "Israel" on their passports, the brief says, *id.* at 26, "that personal prejudice" How is it any more of a personal prejudice than not wanting "Jerusalem" on your passport, in favor of "Israel"?

Sadly, there may be a double standard here, where Palestinian-Americans are seen as tending to be bigots, while Israeli-Americans get to have "dignity", Br. at 16. This contradiction alone shows a lack of strength in Petitioner's position. (He does not call people who choose Taiwan "prejudiced", but only reserves that for Palestinians, interestingly.)

By the way, this all helps make the point that the State Department allowing people to choose Haifa or Taiwan as their birthplace, instead of Israel or China, is very different from allowing the Jerusalem-born to choose Israel as birthplace. In the first two instances, the passport-holder is allowed to move *downward*, so to speak: instead of choosing a larger unit like "Israel" or "China", she may choose a *smaller* geographical unit (and thus not necessarily implying recognition issues *per se*) like Haifa or Taiwan. However, in the instant case, Petitioner

wants to move *upward*, i.e., to choose a *larger* unit, Israel instead of Jerusalem: a choice which automatically and seriously implicates recognition issues. Thus, Petitioner's case differs hugely from those involving Haifa or Taiwan.

And as Respondent's counsel brilliantly notes, "Petitioner . . . argues that Section 214(d) merely permits individuals to 'identify themselves as born in "Israel."' [But] Section 214(d)'s one-sided operation—it does not permit Palestinian-Americans born in Jerusalem after 1948 to self-identify as being born in 'Palestine'—is inconsistent with offering 'self-identification." Br. at 56 (citations omitted). And it does not end there. For example, Christians of traditionalist bent, if born in Jerusalem, are not allowed to put "Latin Kingdom of Jerusalem 2.0" (or words to that effect) on their passports. Etc. Only partisans of Israel are privileged by Section 214(d).

VIII. REFUTING THE AMICUS BRIEFS FOR PETITIONER

The amicus briefs of July 2014 supporting Petitioner are skilled and interesting, yet in error. Amicus shall try to refute various points from them.

Pace the opinion of the brief for International Association of Jewish Lawyers and Jurists, allowing "Israel" on a Jerusalem-born's passport would indeed implicate the recognition power, as the Government would seem to be talking out of two sides of its mouth if the Executive "officially declared" Jerusalem's non-Israeli status, while allowing the passport to declare otherwise. If someone says "I like

you" while he is meantime slapping you in the face, perhaps you should doubt his credibility.

The brief of the American Jewish Committee claims, "The [Receive Ambassadors C]lause is not included as a power of the President in Section 2 of Article II, but rather is placed in Section 3[,] which contains a list of executive duties." *Id.* at 4 (quotations and citation omitted). This is not strictly true, though. Section 2 lists some "powers", such as making a treaty with the advice and consent of the Senate, *see id.* at § 2 cl. 2, that are actually more trammeled (by the need to cooperate with Congress) than some of the "duties" in Section 3, e.g., as Amicus previously noted, the President's ability to call Congress into session, or adjourn it, is a power indeed. So the placement of the Receive Ambassadors Clause in Section 3 does not hurt Respondent's case.

The brief for the United States Senate lists, *see id.* at 7, a number of issues (such as how U.S. courts treat judgments of courts in Jerusalem) related to recognition of a sovereign: issues which the brief claims are not fulfilled by merely a passport saying "Israel", thus showing that the name "Israel" does not show official recognition of Israel. However, the claim, "It does not determine the status of any sovereign property", *id.*, is not really true, as the passport is a declaration, in writing on a U.S. state document borne and shown in foreign countries to which the passport travels, that Jerusalem is Israeli property.

Also, the Senate brief claims "that the specter of adverse consequences does not render [foreign-

policy-related] legislative action unconstitutional." *Id.* at 8. If the President has exclusive recognition power, he may not even need bring up the specter of unpleasant consequences; but if his power is non-exclusive, then the possibility of bad consequences may be considered part of the "mix" that the President, or courts, consider re his recognition power.

The brief also says, "The 'place of birth' specification assists in identifying the individual[; t]hus, the Department itself recognizes that the 'place of birth" entry in a passport serves to aid in identifying the passport bearer; it is not an instrument for recognizing foreign sovereignty." *Id.* at 23 (spacing changed, citation omitted). But that is not necessarily true: the identification of the individual, if it identifies the individual as being born in Israel, *de facto* recognizes foreign sovereignty, even if it does not do so *per se*.

The brief of Louis Fisher contends that Justice George Sutherland made some mistakes in *Curtiss-Wright*, even calling Sutherland a liar, *see* Fisher Br. at 23. Fisher also deplores dicta, *see id.* at 5-7. True, some lower courts may be addicted to dicta from this Court; but, *inter alia*, what is "holding" and what is "dicta" in any one case may be debatable. Moreover, there are many sources Respondent presents besides *Curtiss-Wright* to support Respondent's claims, regardless of whether Sutherland was some conniving jurisprudential viper or not.

The brief of Public Citizen says at 4, "[T]he President may make clear in public statements and in applicable State Department manuals that

Congress has created the right of someone born in Jerusalem to [have] Israel listed as his place of birth and that the President's position is that the status of Jerusalem remains an open question[.]" *Id.* at 4. But the world probably neither reads nor cares about "applicable State Department manuals", nor maybe even cares much about "public statements", since the passports speak louder than words.

It is not the President's job to be reduced to complaining and protesting about recognition status. That may be beneath his dignity and job as Head of State. Rather, the Congress can pass as many resolutions as it likes, deploring the President's refusal to recognize Jerusalem as Congress wishes. And Petitioner may do similarly.

That is, Zivotofsky has ample First-Amendment-protected alternatives, such as putting up a billboard, or wearing a T-shirt, proclaiming his personal belief that all Jerusalem is somehow Israeli property despite the opinion of the Executive (and most of the world too). There is also the wide world of social media: the Zivotofskys, even young Menachem if he is interested, can use "YouTube", "Facebook", "Twitter", or other informational vectors to spread their belief that Jerusalem should be exclusive Israeli property. They should not use state property, like a passport, to do so.

As for "[T]o the extent that the power of recognition rests on the need for an immediate determination, or the superior ability of the President to gather the relevant facts to make such a decision, those considerations have no bearing on this case. The facts . . have been [known] for decades", *id.* at 11, there may always be new facts

coming in. Even if there were none: since in general the President and State Department are able to act more quickly and deftly re foreign affairs, that is enough to justify an Executive power over recognition, without courts nitpicking over any case where supposedly "all the facts are known"

"If, as the Court held in *Chadha*, action by a vote of one House of Congress has no constitutional significance, then inaction by both Houses cannot possibly have any greater effect." Br. at 5-6. If the inaction has persisted for decades (or centuries), it could easily have precedent and effect.

"The idea that Congress has ceded constitutional power by silence is particularly offensive to the principles of *Chadha*. It assumes . . . that Congress has the right to give away its constitutional power[.]" *Id.* at 26. But this contradicts what the Senate brief says, *id* at 16: "*See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ('[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.')" (citation and some quotation marks omitted). If Congress has long let the Executive have sway in recognition issues, especially since *Curtiss-Wright*, that should count for something.

(The brief opines later, "Unlike *Noel Canning*, this case does not involve an interpretation of constitutional text[.]" *Id.* at 29. But does not the Receive Ambassadors Clause count as constitutional text?)

Congress may be precisely "giv[ing] away its constitutional power"—albeit not to the President—, Pub. Citizen Br. at 26, and wrongly, if it *ultra vires* delegates recognition power to private citizens, as Amicus discussed *supra*.

Presidential signing statements, by the way, have always given Amicus some pause. However, that does not mean that signing statements on the whole are illegitimate, especially compared to maneuvers like the unconstitutional "line-item veto". The line-item veto was a monstrosity, practically making the President into a Congress-unto-himself. However, a signing statement does not strike down legislation, it merely shows the President's intent about enforcement of it. So, while a signing statement allowing torture would tend to be unconstitutional, a signing statement that *prevents* unconstitutionality, e.g., one that prevents Congress from usurping the President's final say on recognition matters, should not give much pause to thoughtful people. Signing statements may actually help preserve the balance between the Government's branches, then.

The brief of the Zionist Organization of America mainly focuses, *see id. passim*, on the fact that in other venues besides passports, e.g., bureaucratic documents, the Government may have used the term "Jerusalem, Israel" However, a passport is a very special document, one largely for external (foreign) consumption, as opposed to domestic. Also, in internal bureaucratic affairs, agencies might have found it useful to make reasonably clear to employees where "Jerusalem" was, although those agencies should have said "Jerusalem, Middle East"

or something. Maybe "Jerusalem, Israel" was the best they knew how to do. Detailed description can be helpful. (This may be one reason that the group calls itself the Zionist Organization of America, as opposed to, say, the Zionist Organization of West Burma.)

The brief also notes that, *see id.* at, e.g., 5, the Government erased "Israel" from some of its Jerusalem-related publications, following the ZOA mentioning to them the presence of "Israel". If so, then the ZOA has well served America by alerting the Government to the (now-corrected) errors.

The Brandeis Center brief says, *id.* at 1, "LDB is concerned that the discussion of matters pertaining to Israel often invokes double-standards and unduly tortured logic[.]" This may apply to Petitioner's calling Palestinians "prejudiced" while praising others' "dignity", as noted *supra*.

"Nothing immunizes the recognition power, with all its attendant difficulties, from the constitutional avoidance doctrine." Br. at 8. If so, this may be a good reason to do as Amicus mentioned and solve the case in favor of Respondent on non-delegation grounds alone.

"However, receiving ambassadors does nothing to establish geographic facts." Br. at 12. That depends: if the State of Palestine (as it calls itself) regains East Jerusalem as property, a piqued America could always refuse to recognize that State or receive its ambassador.

"Congress can also declare or authorize war on a nation without recognizing its existence as a

sovereign." Br. at 16. Exactly. Thus, Congress is not crippled in its powers by the President retaining the last word on recognition.

Br. at 17:

> The Government's theory not only clouds the Neutrality Act; it would bar Congress from declaring war on North Korea because the United States does not recognize it as a state. Moreover, if Congress were to declare war on North Korea, the President's theory of this case could sanction his bombing of South Korea, and even China, Mexico, or Jerusalem (which, if it is not in Israel, may after all be in North Korea), as exclusive "decider" of what territory comprised the enemy nation.

Id. Was that unintentional comedy?

That is, first off, Amicus is not sure how Respondent's theories prevent a declaration of war on a non-sovereign. Second, the Brandeis briefers must have a pretty low opinion of the President if they think he is going to start bombing the other Korea, or the mythical "Jerusalem putatively in North Korea although it is on the other side of Asia by the Mediterranean" that the briefers invoke, in one of the most hallucinatory spectacles Amicus has read in a Supreme Court brief. (A "Brandeis brief" is supposed to be informative on the facts, not resemble hallucination.)

"Hypothetically", yes, the President could "lose his marbles", and if we are at war with Mr. Putin, our President could avoid bombing Moscow, Russia and instead bomb Moscow, Scotland (yes, there is such a place), or even Moscow, Texas. However, if the President has really "gone nuts", then the Constitutional remedy is his prompt removal from office under Amendment XXV of the Constitution, and also under lock, key, and 24-hour psychiatric care. The "parade of horrible relocation of North Korea to Jerusalem" is a little too strained for Amicus (or any rational person) to believe; and thus, *pace* Brandeis' brief, this Court need not worry that just because he has recognition power, the Chief Executive will start bombing the Supreme Court building if he wants to construe North Korea as being at 1 First Street, N.E., Washington, D.C.

"Congress's regulation of commerce with states or territories is not impacted by the latter's recognition status." Br. at 19. Again, this makes the point for Respondent, since the President's power does not hamstring Congress' legitimate powers.

"If Congress can designate the West Bank as *de facto* assimilated to Israel in the exercise of its Tariff and Foreign Commerce powers, there is no reason it should not be able to do the same with Jerusalem (a geographically partially overlapping designation) under its Immigration and Nationality powers." *Id.* at 21. No, not if Congress lacks supreme recognition power.

"But if such listings [of birthplace] are merely administrative, Section 214(d) is nothing more than

a routine Congressional reference to a fact about our world, and well within Congress's exclusive power to direct." *Id.* at 23. But if the rest of Section 214 is meant to nudge toward, or foreshadow, recognizing Jerusalem as Israeli, then, in context (and in context of Israel's 1980 annexation of all Jerusalem), 214(d) is far more than "routine".

"'West Bank,' 'Gaza Strip,' and "Palestine,'. . . which have never been recognized as countries by the United States, nor existed as such." Br. at 25. The State of Palestine might beg to differ about the last one on that list.

The brief of Texas says, "Nor does it follow that the President holds the still further power to prevent Congress from allowing individual citizens to express their dissent from the executive's views on their passports." *Id.* at 3. But a passport is not a complete free-speech zone. The situation in the instant case is not like forcing someone to put "Live Free or Die" on their license plate; it's about territorial recognition. A Mennonite or other peace-lover does not necessarily have the right to request a U.S. passport where the eagle has peace signs instead of the arrows of war, just because that citizen is offended.

"A ruling for the Secretary will inaugurate a new, substantive-due-process-like doctrine of executive power, where the President is empowered to push aside democratically enacted legislation in the name of supposed 'constitutional' powers that have no textual footing[,] but that the President nevertheless believes should belong exclusively to him." Br. at 3-4.

Amicus notes the mixed metaphor (substantive due process as Presidential power?), and also believes that a well-crafted, not-overbroad ruling by this Court need not inaugurate disaster.

"Even if this Court were to demand that the 'longstanding practice[s]' [re recognition] be defined with specificity, that will not ensure that future Presidents or courts will follow the instruction—especially when a ruling for the Secretary will require this Court to resort to some degree of abstraction." *Id.* at 36. Again, Amicus actually has great faith in this honorable Court, that they can make a narrow ruling which will let the President have the last word on formal recognition (e.g., passports), without letting him gain undeserved power and become a tyrant.

The brief of the Endowment for Middle East Truth (EMET) says, *id.* at 3, "But when Congress disagrees with the President, Congress wins." But if this were universally true, then the Executive would not be a coequal branch with the Legislative.

The EMET brief, *see id. passim*, is largely about the President's duties to execute the laws, and not to unilaterally run foreign policy. However, signing statements may legitimately allow Presidential non-enforcement of laws (including unconstitutional ones); and there is no Question Presented here as to whether signing statements themselves are *ipso facto* illegal or unconstitutional. And retaining the recognition power does not make the President the King of All Foreign Policy.

The brief for U.S. House of Representatives members says, *id.* at 4, "The recognition power cannot be drawn so broadly as to swallow completely, at the Executive's sole discretion, the exercise of Congress's law-making authority in the fields of immigration, naturalization, foreign commerce, passport control, criminal law, and foreign policy." Quite so, and vice versa, Congress should not encroach on the Executive.

"Indeed, the Executive has *already* taken the position that it should not be bound by restrictions and conditions placed on the Executive by Congress through its 'appropriations authority' that are at odds with recognition policy." *Id.* at 10 (footnote omitted) If this is so, then the House members have a point. The Court, then, could narrowly rule that the President has final say on recognition, but that he may have to fund it out of his own pocket if he can't convince the House. (Some wealthy ambassadors might serve for free, true...)

"In light of the Constitution's text, structure, and purpose, it is clear that the exclusive recognition power should be drawn narrowly by this Court so as not to trench on or engulf Congress's Article I powers." *Id.* at 19. Well said, and helpful to Respondent.

The brief of the Anti-Defamation League et al. says,

> Section 214(d) . . . is, on its very face, a limited provision[, allowing] record[ing] place of birth as "Israel." Were there any doubt that this

> recording is solely for this limited purpose, the provision begins, "*For purposes of.*" . . . The provision simply authorizes American citizens to identify their place of birth on their own passport[.]

Id. at 6. But regardless of any stated purpose, the *de facto* effect is to produce an American governmental endorsement of Israeli ownership of Jerusalem. Moreover, the passport is the property of the Government, not just of the bearer.

That brief also claims, *see id.* at 11 n.2, that forcing someone to have in their passport just "Jerusalem" instead of "Israel" means the person is doomed to risk being mistaken for a native of some other place called Jerusalem, globe-wide. However, this is no worse than for a Palestinian born in Jerusalem before 1948, who has the choice of either "Jerusalem" or "Palestine", which could be Palestine, Texas (a real place), so that passport-readers could be confused by that too.

The brief claims at, e.g., 19, that an explanatory footnote can be put in the passport, *see id.* However, that footnote may be seen as hypocritical: when the birthplace says "Israel", that may be seen as more determinative than a mere footnote.

At 24-25, *see id.*, the ADL brief notes that Palestinians born before 1948 (and thus before modern Israel even existed) may list Palestine instead of Israel on their passports. This is a limited exception, given to some old generations who are dying out, and who may have been traumatized by

what they may see as the *Nakba*, the catastrophe, of Israeli occupation of Palestinians' homeland. By contrast, 214(d) gives every generation from now on the right to put "Israel" instead of "Jerusalem", which is a far broader grant.

If the Court feels those elderly Palestinians are getting an unfair advantage, the Court could, instead of letting Petitioner put "Israel" on his passport, ban both "Israel" for new passports of Jerusalemites, and "Palestine" for any new applicant born c. 1948 or before who now wants a passport with "Palestine" Or, if it insists, the Court could demand that all the 1948-era passport holders with "Palestine" on their passports turn in their passports for new ones without "Palestine" However, this may seem inhumane.

IX. THE HIGHLY-COMPELLING NATIONAL INTEREST IN NOT RECOGNIZING JERUSALEM AS ISRAEL'S BEFORE INTERNATIONAL AGREEMENT

The late comedienne Joan Rivers (RIP), around the time of the recent "Gaza War" involving Israel and Hamas, said, "The Palestinian vote for Hamas was making them get what they deserved[.] 'You're dead, you deserve to be dead you started it[:] Don't you dare make me feel sad about that.' She called the ones who were killed as being people with 'very low IQs.'." Revathi Siva Kumar, *Many On Twitter Call Joan Rivers' Death A Karmic Payback*, Int'l Bus. Times—Australia, Sept. 18, 2014, 12:49 p.m.[8]

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[8] http://au.ibtimes.com/articles/566697/20140918/joan-rivers-controversies-media-hiroshima-nagasaki-offensive.htm#.VCj2Rbl0xUF.

Unfortunately, Rivers' rant typifies what many in the world think about America re the Middle East, i.e., that American and Americans unduly favor Israel and hold Arab or Palestinian life and dignity as worthless.

Amicus does not believe that stereotype *supra*. Of course, it is commonly acknowledged that America has a treasured friendship with Israel. (And many Americans wish Israel well and *L'shana tovah* ("Happy New Year") during the present High Holidays including Rosh Hashanah.) However, that does not mean that the two nations must always agree on everything. In fact, if America thinks Israel is hurting not only America's interests but Israel's own long-term interests, then America, a Nation which has been immensely generous and kindly to Israel, may act appropriately.

For example, after Israel annexed East Jerusalem in 1980, provoking world ire, *see* Wikipedia, *East Jerusalem*,[9] "[i]n 1991[,] United States Secretary of State James Baker stated that the United States is 'opposed to the Israeli annexation of East Jerusalem and the extension of Israeli law on it and the extension of Jerusalem's municipal boundaries'." *Id.* (footnote omitted) Under Israel's rule, "On 22 June 2013, the Israeli Public Security Minister closed the El-Hakawati Theater for eight days, to prevent a puppet theater festival with an 18-year tradition." *Id.*

However, Israeli security forces have not only been busy closing puppet shows, they have also been

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[9] http://en.wikipedia.org/wiki/East_Jerusalem.

brutally beating an American citizen in Jerusalem. *See* Nir Hassson, *Israeli officer indicted for beating Palestinian-American teen in July*, Haaretz, Sept. 11, 2014, 12:33 p.m.,[10]

> Israel Police filed an indictment on Wednesday against an officer who was filmed beating a Palestinian-American teenager during a violent protest in July.
>
> Tariq Abu Khdeir, who lives in Tampa, Florida, was beaten at an East Jerusalem protest that followed the death of his cousin, 16-year-old Mohammed Abu Khdeir, who was burned to death by Israeli extremists in revenge for the killings of three Israeli teens in the West Bank.
>
> [The indictment related,] "After full control over the plaintiff was achieved, the accused began to beat him, punching and kicking his head, face, shoulders and torso. All this occurred while the plaintiff was not resisting arrest . "
>
> The accused beat Abu Khdeir until "his [sic] lost his senses," said the indictment[.]

[10] http://www.haaretz.com/news/national/1.615169.

Id. See also Ori Lewis, *U.S. asks Israel to probe beating of American teen in Jerusalem*, Reuters, July 5, 2014, 7:58 p.m.[11] (State Department calls for investigation).

Americans have a right to protect their own people, such as Tariq Khdeir. Were Jerusalem under international sovereignty right now, say, the United Nations, Khdeir might not have been beaten senseless by Israelis. He is only one person, but his physical suffering under Israeli sovereignty exceeds the importance of any pique or annoyance that Petitioner could feel from not getting to put "Israel" on his passport.

Fortunately, Khdeir did not die, although some Americans have died at Israeli hands, e.g., the sailors killed in the mistaken Israeli attack on the *U.S.S. Liberty* in 1967, and activist Rachel Corrie under an Israeli bulldozer in 2003. Despite those negative incidents (and non-fatal ones such as Jonathan Pollard's spying on America for Israel), a positive relationship with Israel continues: but again, America has to be careful about its own interests.

An insightful recent article, Connie Bruck, *Friends of Israel*, The New Yorker, September 1, 2014 issue,[12] notes of a tendency among politicians show great deference to lobbyists for Israeli causes (especially of a territorial-expansionist nature), "[Former U.S. congressman Brian] Baird said, 'When

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[11] http://www.reuters.com/article/2014/07/05/us-palestinians-israel-investigation-idUSKBN0FA0XZ20140705.

[12] *Available at* http://www.newyorker.com/magazine/2014/09/01/friends-israel.

key votes are cast, the question on the House floor, troublingly, is often not "What is the right thing to do for the United States of America?"" *Id.*

Fortunately, some government officials are still on the watch, *see, e.g.*, Michael Wilner, *US wants Israel to reverse land grab*, The Jerusalem Post, Sept. 2, 2014, 8:17 p.m.,[13]

> The United States has officially called on Israel to reverse its decision to appropriate 988 acres of land near Bethlehem in the West Bank . .
>
> "We are deeply concerned[,]" State Department spokeswoman Jen Psaki said. "We have long made clear our opposition to continued settlement activity."

Re Israeli expansion especially, part of the problem with removing the President's recognition power is that it could lead to no end of mischief. For example, if Israel annexes the whole West Bank, or even a large chunk of it (the so-called "Area C"), and Congress recognizes that massive seizure, does the President have a right to veto that recognition, or is he left holding the bag in dealing with the whole world?

See, for proof that such annexation is not just an idle threat like academics' *supra* that the President will bomb Jerusalem because he considers it "North

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[13] http://www.jpost.com/Breaking-News/US-wants-Israel-to-reverse-land-grab-374249.

Korea", JPost.com Staff, *Likud MK Danon: Israel should annex West Bank settlements in response to Abbas' drive for statehood*, The Jerusalem Post, Sept. 26, 2014, 7:50 p.m.,[14] "In response to Palestinian Authority President Mahmoud Abbas' threat to unilaterally seek UN Security Council approval for statehood, Likud MK Danny Danon urged the government to annex the Jewish settlements of Judea and Samaria." *Id.*

So, letting Petitioner or similarly-situated people is not fine and dandy after all, since it is a signal that American has no problem with endless Israeli territorial expansion. And such signals may have terrible effects: *see, e.g.*, the *Zivotofsky v. Clinton* (132 S. Ct. 1421 (2012)) merits amicus brief by Americans for Peace Now (Sept. 30, 2011), supporting respondent Hillary Rodham Clinton, at 27-30, noting the rage all over the Muslim and Arab worlds (not just by "a few Palestinians") when President Bush signed 214(d) into effect, e.g., "the Organization of Islamic Conference's secretary general Abdelouahed Belkeziz commented that the signing of the bill 'will inflame Muslim feelings everywhere and will not make the United States' mission as a peace mediator in the Middle East easy'", Peace Now Br., *supra*, at 29. Indeed, it may be not only in America's interest that 214(d) be found invalid; it is likely in Israel's long-term interest as well, if the friendship of the world means something to Israel.

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[14] http://www.jpost.com/Breaking-News/Likud-MK-Danon-Israel-should-annex-West-Bank-settlements-in-response-to-Abbas-drive-for-statehood-376392.

In all, even if the issue of compelling interest is not necessary to discuss, e.g., because the President has exclusive power and does not need a reason to exercise it: there is very compelling interest in letting the Executive prevent Jerusalem-born citizens from putting "Israel" as their birthplace on the passports.

* * *

Psalm 87 notes, while saying Jerusalem is in Israel, *see id.*, "And it will be said of Jerusalem, 'Everyone has become a citizen here.' . When the LORD registers the nations, he will say, 'This one has become a citizen of Jerusalem.'" *Id.* (New Living Translation) It is not a punishment to have "Jerusalem" on your passport.

The Receive Ambassadors Clause; *Curtiss-Wright*; decades (or more) of precedent, including both conservative Republican and liberal Democratic Presidents; the idea of non-delegability of choice over recognition; and the compelling interest of not endorsing Israeli annexation of Jerusalem (or anywhere else), among other reasons, justify keeping "Jerusalem" on the passports of the Jerusalem-born. Petitioner may have been raised to think it is important that he have "Israel" on his passport; but if the Court decides that he has to have "Jerusalem" instead, Amicus suspects that at adult age, the Petitioner may not mind that. After all, there is strong evidence that for legal and political reasons, and following the tradition of Psalm 87, maintaining Jerusalem on the passport will serve the best interests of Menachem Zivotofsky's people—the American people.

CONCLUSION

Amicus respectfully asks the Court to uphold the court of appeals' judgment, on whatever suitable grounds; and humbly thanks the Court for its time and consideration.

September 29, 2014 Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ENDOWMENT FOR MIDDLE EAST TRUTH (EMET) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Endowment for Middle East Truth (EMET) is a Washington, D.C. non-profit think tank dedicated to preserving and defending the national security of the United States, and its ally, Israel. It provides information and analysis to Senators and Members of Congress. EMET is a primary resource for those concerned with American and Israeli security.

EMET has an interest in the status of Jerusalem and its connection to Israel, while recognizing that this question is not before the Court. EMET also has an interest in the proper allocation of powers between the Executive and Legislative departments under the United States Constitution.[1]

INTRODUCTION

This case has revolved around the "receive Ambassadors" clause, U.S. Const. Art. II, section 3, and whether it "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him." But stating the question this way concedes too much to the President. *Amicus* agrees with Petitioner and those scholars who conclude that the Constitution merely imposes a ministerial duty on the President. Pet'r's Brief 28-29; Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801 (2011); Saikrishna B. Prakash & Michael D. Ramsey,

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amicus* or its counsel has made a monetary contribution to this brief's preparation or submission. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

Foreign Affairs and the Jeffersonian Executive: A Defense, 89 Minn. L. Rev. 1591 (2005):

> [The "receive Ambassadors" clause] may have imposed a duty on the President: he "shall" receive ambassadors—that is, he must formally greet foreign officials and receive their credentials, a tedious duty necessitated by international customs. The clause's presence in Section 3 supports this interpretation, for while Section 2 generally lists powers, Section 3 is sometimes understood to list duties.

Id. at 1627-1628.

Consequently, *Amicus* contends that the "receive Ambassadors" clause does not create a recognition *power*, and certainly not a recognition power exclusive to the Executive department.

The question therefore arises, on what basis could the President legitimately refuse to enforce section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law No. 107-228, 116 Stat. 1350 (2002)? It would be the broad claim President George W. Bush actually made in his signing statement: section 214(d) "interferes with the President's constitutional authority to conduct the Nation's foreign affairs." *Statement on Signing Foreign Relations Authorization Act*, 2 Pub. Papers 1697, 1698 (Sept. 30, 2002).

Thus, the larger issue of whether the Constitution does, in fact, commit foreign policy to the Executive Branch must be considered.

SUMMARY OF ARGUMENT

It is not clear that the "receive Ambassadors" clause actually includes a recognition power. Nor is it clear which political branch should exercise that power. If the President does not have an exclusive recognition, the only way to uphold his refusal to implement a properly-enacted statute would be a general Executive Branch monopoly on making foreign policy.

But the Founders intended the executive power of the federal government to consist chiefly of executing the laws enacted by the legislature. It was probably the Progressive movement, some hundred years later, that developed the notion of a presidency that dominates the national government, including plenary foreign affairs powers.

There is no textual basis for presidential command of foreign policy. The Constitution gives the President specific, defined foreign policy responsibilities, which he must share with Congress. Congress, on the other hand, holds "all" legislative power. That necessarily includes legislating foreign policy, as well as domestic policy. And in fact, Congress has legislated American foreign policy from its first session until today.

The proper way to conceptualize the relationship between the political branches is that the President has no independent power to determine American foreign policy. However, Congress often permits the President to take the lead, and ratifies his policy, either implicitly or explicitly. But when Congress disagrees with the President, Congress wins.

ARGUMENT

I. THE PRESIDENT CANNOT IGNORE A PROPERLY-ENACTED STATUTE SIMPLY BECAUSE IT CONCERNS FOREIGN AFFAIRS.[2]

When Congress passes a bill and the President signs it, it becomes law. Unless the law is unconstitutional, the President has the duty to enforce it.

That's the fundamental relationship the Contitution erected between the political branches. There is no exception for foreign affairs. *Particular* functions relating to foreign relations are allocated. But the essential distribution of political power—Congress creates laws, the President executes those laws—is not limited to domestic affairs.

A. WHETHER THE PRESIDENT CONSTITUTIONALLY CONTROLS UNITED STATES FOREIGN POLICY REMAINS AN OPEN QUESTION.

The notion that foreign policy is a presidential preserve is widely believed. Indeed, some regard it as a truism.

But the picture is not simple. Focusing on the recognition power, Petitioner has amply shown that from the founding period throughout the nineteenth century, the political branches themselves were at least uncertain about their respective powers. Pet'r's Br. 34-57.

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[2] *Amicus* acknowledges the valuable legal history research assistance of Carl Cecere, Principal of Cecere PC, Issues and Appeals, and Lorianne Updike Toler, constitutional legal historian and founder of Libertas Constitutional Consulting, and of www.ConSource.org.

Contemporaneous legal scholars were similarly hesitant in their conclusions. See 1 St. George Tucker, *Blackstone's Commentaries* App. 341, Note D (1803) (the "receive Ambassadors" clause is "a power of some importance, as it may sometimes involve in the exercise of it, questions of delicacy; especially in the recognition of authorities of a doubtful nature"); William Rawle, *A View of the Constitution of the United States of America* 195 (2d ed. 1829) (the "receive Ambassadors" clause implies presidential recognition power, but Congress can override); 3 Joseph Story, *Commentaries on the Constitution of the United States of America* §§ 1560, 1561 (1833) (agreeing with Rawle that the "receive Ambassadors" clause implies executive recognition power, but says that whether Congress can override is a difficult question).

Turning to the broader issue of control over foreign policy, there are Supreme Court opinions one can brandish to support the claim of exclusive Executive power. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), and *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955). But as the Court of Appeals noted below, all such past statements from this Court are dicta:

> To be sure, the Court has not *held* that the President exclusively holds the power. But, for us—an inferior court—"carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative . ."

Zivotofsky v. Sec'y of State, 725 F.3d 197, 212 (D.C. Cir. 2013) (emphasis in original).

But while lower courts may have to bow before Supreme Court dicta, of course this Court itself does not.

Moreover, the court below did not take seriously enough this Court's decisions pointing the other way—recognizing the right of Congress to have its hand on the foreign policy steering wheel.

For example, in *Perez v. Brownell*, 356 U.S. 44 (1958), *overruled on other grounds* by *Afroyim v. Rusk*, 387 U.S. 253 (1967), this Court stated:

> Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation.

Id. at 57.

This Court has also said:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

The opinion of the Court of Appeals cites to a number of historic episodes, but none involve instances in which the President overrode validly-enacted legislation by Congress. *Zivotofsky v. Sec'y of State*, *supra* at 207-210. Thus, none prove that the

President actually has an exclusive power of recognition, or an exclusive control of foreign policy.

In short, the question is unsettled. This Court has never definitely answered the question: Under the Constitution, when Congress passes a law which clashes with a presidential policy in foreign affairs, who wins? This case provides an opportunity to answer that question.

B. CONGRESS MAKES THE LAWS. THE PRESIDENT EXECUTES THE LAWS.

The Constitution does not explicitly state that one or the other of the political branches shall control foreign policy. So we must begin with first principles. "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1. Note that the Constitution does not say that Congressional legislative power stops at the shoreline, or even the continental shelf.

Turning to the President, "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. "[H]e shall take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. No legislative power is confirmed in the President.

The Founders' conception of the Executive Branch was shaped by their experience of rebelling against the excesses of the British crown. They did not want a monarchical President. Implementing the laws enacted by Congress would be his chief business.

Thus, for example, Thomas Jefferson stated in his 1783 "Draft of a Fundamental Constitution for Virginia" that the executive power is strictly defined:

> By Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative We give them these powers only, which are necessary to execute the laws (and administer the government).

Quoted in Charles Warren, *The Making of the Constitution* 177 (1947).

Roger Sherman concurred: he "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect."

Id. at 65.

James Wilson also held that executive power was limited "to executing the laws, and appointing officers."

Id. at 66.

Alexander Hamilton was the leading proponent of a strong executive. However, he made clear that he didn't mean an overreaching president, but rather one who would energetically and vigorously "take Care that the Laws be faithfully executed":

> A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government. THE FEDERALIST No. 70 (Alexander Hamilton).

James Madison is often acknowledged as the father of the Constitution. And he too conceived the role of the President as dependent on Congressional legislation:

> The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed.

James Madison, 6 *The Writings of James Madison* 145 (Gaillard Hunt, ed., (1900-1910)).

This is the view that prevailed at the Constitutional Convention:

> There was no challenge to the definition of executive power held by Wilson and Madison; nor was an alternative understanding advanced.

David Gray Adler, *Symposium: The Steel Seizure Case and Inherent Presidential Power*, 19 Const. Commentary 155, 165 (2002).

Now, there is another, more expansive yet still somewhat originalist theory of executive power. It posits that in the eighteenth century, "executive power" was widely understood to inherently include the conduct of foreign policy. Saikrishna B. Prakash & Michael D. Ramsey, *supra*.

Perhaps this was an ambient understanding at the time of the Constitutional Convention. But the crucial point is that the Founders *rejected* it. The theory ignores that the Founders turned away from the theory of executive "prerogative," which indeed gave the king or prince unfettered power to create his country's foreign policy. The Founders, as shown above, wanted a more modest executive role. *See also* Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545 (2004).

It follows that the President is bound to obey Congress. "To 'execute' a statute, as Senator Sam J.

Ervin often reminded executive officers, emphatically does not mean to kill it. Execution means implementtation." Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 398 (1987).

Long ago this Court held:

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.

Kendall v. United States, 37 U.S. 524, 613 (1838).

It is likely that the more powerful, expansive, "imperial" conception of the presidency—with the Executive dominating Congress, and foreign affairs—came to the fore in the Progressive era of the late nineteenth and early twentieth centuries. Many Progressives regarded the Constitution, including the principle of the separation of powers, as outdated. For example, Woodrow Wilson wrote:

> The makers of the Constitution constructed the federal government upon a theory of checks and balances which was meant to limit the operation of each part and allow to no single part or organ of it a dominating force; but no government can be successfully conducted upon so mechanical a theory. . . . The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. . . . No living thing can have its organs offset against each other as checks, and live. . . . The President is at liberty, both in law and in conscience, to be as big a man

> as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the makers of the Constitution,—it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him and Congress has not. .One of the greatest of the President's powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. . . Our President must always, henceforth, be one of the great powers of the world . . .

Woodrow Wilson, *Constitutional Government in the United States* (1908), reprinted in American Progressivism 153-167 (Ronald Pestritto and William Atto, eds.) (2008).

But this is far from the Founders' idea of the presidency which they embodied in the Constitution.

C. THERE IS NO FOREIGN POLICY EXCEPTION TO EXCLUSIVE CONGRESSIONAL LEGISLATIVE POWER. AT MOST, THE PRESIDENT HAS SPECIFIC, DEFINED POWERS AFFECTING FOREIGN RELATIONS.

One searches in vain for any textual support for presidential legislation of foreign policy. Article II, § 2 confides specific powers touching on foreign affairs to the President. However, these do not add up to the claimed power to direct American foreign policy.

Generally, at the Constitutional Convention every time a unilateral power was proposed for the presi-

dent, it was rejected in favor of sharing that power with Congress.

Thus, under the Constitution, the President is the commander in chief of the armed forces, although only Congress can declare war. U.S. Const. art. I, § 8. He can make treaties, but only with the advice and consent of a supermajority of the Senate; he nominates ambassadors, but only with the advice and consent of the Senate. Thus, not only does the President have but few explicit foreign affairs powers; he may exercise them only with congressional oversight.

Section 3 of Article II contains the "receive Ambassadors" clause. As noted above, this is a duty, not a power. Pet'r's Br. 28-29.

That's it.

War-making, treaty-making, ambassador-appointing (and perhaps ambassador-receiving)—there is no plausible theory which can knit together these disparate functions to create overarching presidential command of foreign policy.

More important, there is nothing here to overcome Article I, § 1, granting *all* legislative power to Congress. "All" is not a term of art. It presents no interpretive complexities. Accepting presidential control of foreign policy means shutting Congress into a "domestic policy" stockade. That would limit Congress' field of operation. Congress would no longer have "all" legislative power. There is no constitutional warrant for that.

D. CONGRESS HAS IN FACT LEGISLATED IN FOREIGN AFFAIRS FROM THE BEGINNING.

A presidential claim that Congress can't interfere with his control of foreign policy is, on its face, not serious. Congressional action shaping American foreign relations began in the earliest years of the nation.

> An Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'

Marsh v. Chambers, 463 U.S. 783, 790 (1983) (ellipsis in original) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

The very creation of the State Department itself is the result of congressional action. Act of July 27, 1789, ch. 4, 1 Stat. 28, 29. Section 1 of the act requires the Secretary of Foreign Affairs to:

> perform and execute such duties as shall from time to time be enjoined or instructed to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department.

The Secretary carries out the will of the President, but only so far as is "agreeable to the Constitution." And the Constitution assigns all legislative authority to Congress. There is nothing in the creation of the State Department to suggest that Congress was giving away any part of its constitutional monopoly on legislating.

There is considerable legislation concerning foreign commerce under the specific grant of power in Article I, § 8 of the Constitution. Of course, commercial relations with foreign nations is a species of foreign policy. For example:

The Act of July 4, 1789, ch. 2, 1 Stat. 24, imposed duties on various imported goods, and preferential tariffs based on country of origin for tea.

The Act of July 4, 1789, ch. 24, 1 Stat. 254 is significant. Congress there defined and established the functions and privileges of French consuls and vice consuls. Section 1 empowers district judges to perform the office of "consul or vice-consul of the King of the French," "to attend to the saving of the wreck of any French vessels stranded on the coasts of the United States" when the consul is absent or the judge is closer. It also enlists the customs officials to assist and to "give aid to the consuls and vice-consuls of the King of the French, in arresting and securing deserters from vessels of the French nation . . ."

Section 2 provides direction to the consuls and vice-consuls of the United States, providing, among other things, procedures for recovering and distributing assets from estates of persons who die abroad.

Section 7 directs the President to provide for seamen stranded in foreign countries, including those in captivity by a foreign sovereign.

Section 8 directs consuls and vice-consuls to ensure that sailors who are stranded in foreign ports by the sale of their ship are given adequate provision to return home.

This statute explicitly directs executive and judicial officers to perform important acts of foreign policy.

Another example. The Act of May 22, 1794, ch. 33, 1 Stat. 369 is "An act prohibiting for a limited time the exportation of arms and ammunition, and encouraging the importation of the same." It prohibits exports of arms for one year. It was designed to prevent accusations of aiding or supplying either side in the confrontation between Britain and France. David Currie, *The Constitution in Congress: The Federalist Period*, 1789-1801 (1997).

A final example. The Act of June 14, 1797, ch. 1, 1 Stat. 520 criminalized privateering against the United States or anyone with whom the U.S. is at peace.

These examples could be endlessly multiplied. The founding-era Congress knew that it had the right to legislate the nation's foreign policy, just as Congress does today.

E. THE SEPARATION OF POWERS, AN ESSENTIAL GUARANTEE OF LIBERTY, IS BREACHED WHEN THE PRESIDENT BECOMES THE LEGISLATOR OF FOREIGN POLICY.

To hold that the President controls, directs or dictates our foreign policy—going so far as to disregard Congressional enactments—is the equivalent of holding that the President *legislates* in the foreign affairs arena. That does obvious violence to our constitutional structure.

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The structural dispersion of political power between the political departments is itself a constraint on that power. *Id.* One branch's encroachment on the functions of the other is a concentration of power feared by the drafters and unintended by the Constitution.

When the President executes Congress' foreign policies, just as he executes Congress' domestic policies, he respects the Constitution's division of powers. But when he ignores a Congressional enactment he acts lawlessly, whether the enactment concerns domestic affairs or foreign affairs.

F. THE THEORY OF CONGRESSIONAL RATIFICATION OF PRESIDENTIAL ACTION SUPPLIES A PRINCIPLED FOUNDATION FOR PERMITTING THE PRESDIENT TO TAKE THE LEAD IN FOREIGN POLICY WHEN CONGRESS IS SILENT.

> [O]ur cases say repeatedly that the President is the sole instrument of the United States for the conduct of foreign policy, but to be the sole instrument and to determine the foreign policy are two different things. . . He's the instrument, but there is certainly room in – in those many cases for saying that Congress can say . . . what the country's instrument is supposed to do.

Justice Scalia, Transcript of *Zivotofsky v. Clinton Oral Argument* at 38, No. 10-699, November 7, 2011.

It is an undoubted fact that the President often takes the lead in formulating American foreign policy. *Amicus* does not assert that such presidential leadership is inevitably invalid under the Constitution.

Rather, when Congress legislates a foreign policy, the President is bound by it, unless it encroaches on a specific executive power. But when Congress either does not interpose its own views, or expressly approves presidential action, Congress can be said to have ratified and adopted the President's policy.

This Court sanctioned the idea of post facto Congressional approval of presidential action in the *Prize Cases*, 67 U.S. 635, 671 (1863):

> [I]t is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "omnis ratihabitio retrotrahitur et mandato equiparatur," this ratification has operated to perfectly cure the defect. In the case of *Brown vs. United States*, (8 Cr., 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"
>
> Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 fn. 3 (1952) (Clark, J., concurring).

The principle is further illustrated in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Court upheld executive orders and regulations suspending American judicial proceedings against Iran in favor of arbitration before an Iran-United States Claims Tribunal. The Court held that the 1868 Hostage Act, 22 U.S.C. § 1732, had given the President discretion to adapt his methods to unforeseen circumstances:

> As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. [Citation.] On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown*, 343 U.S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.

Id. at 678-679.

The court continued:

> Just as importantly, Congress has not disapproved of the action taken here. Though

> Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." [Citation.] We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Id. at 687-688, footnotes omitted.

Thus, the proper conceptualization of the President's foreign affairs power is this: The President does not exercise a foreign affairs power independent of Congress. Instead, Congress often permits the President to formulate foreign policy, and ratifies that policy implicitly or explicitly—unless it doesn't. But when Congress enacts statutes directing foreign policy, or statutorily disapproves of a Presidential foreign policy, the Congressional will must prevail.

CONCLUSION

The proposition that all foreign policy authority dwells in the President can be right only if Congress is constitutionally disabled from legislating on any facet of foreign affairs. That is clearly wrong.

The President is the instrument, but not necessarily the architect, of United States foreign policy. The President may have the sole power to communicate with foreign sovereigns; but Congress can decide what he says.

When the President quarrels with Congress, unless the matter falls within the scope of the powers textually committed to the executive, Congressional

legislation must triumph. Were that not true, the President would be the legislator of foreign policy, violating the most fundamental separation of powers principle.

No improvement is possible on the Court's statement in *Japan Whaling Ass'n. v. American Cetacean Soc'y.*, 478 U.S. 221 (1986):

> The Secretary [of State], of course, may not act contrary to the will of Congress exercised within the bounds of the Constitution. *If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter.*

Id. at 223 (emphasis added).

Let there be an end to Respondent's refusal to obey Congress' command to write "Israel" as Petitioner's birthplace in his passport.

Respectfully submitted,

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July 22, 2014

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-628

Supreme Court, U.S.
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In The
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF LOUIS FISHER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

From 1970 to 2010, *amicus curiae*, Louis Fisher, served for four decades with the Library of Congress as Senior Specialist in Separation of Powers with Congressional Research Service and Specialist in Constitutional Law with the Law Library. Upon his retirement in August 2010, he joined the Constitution Project as Scholar in Residence and the William and Mary Law School as Visiting Professor.[2] He is the author of numerous books and articles on constitutional law and has testified more than 50 times before Congress on a range of issues concerning constitutional disputes and separation of powers. Many of his articles and congressional testimony are available on his personal webpage, http://loufisher.org. Fisher's most recent publication is a treatise on *The Law of the Executive Branch: Presidential Power* (2014). Based upon this expertise, he has an interest in providing the Court with a fuller understanding regarding the scope of presidential authority and the degree to which jurisdiction over external relations is shared

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[1] This brief is filed with consent of the parties. No person other than *amicus* authored any part of this brief or made a monetary contribution to the preparation of this brief.

[2] The views expressed in this brief are Dr. Fisher's own, and his institutional affiliations with the Constitution Project and the William and Mary Law School are provided for identification purposes only.

between Congress and the President. Fisher may be contacted at lfisher11@verizon.net.

SUMMARY OF ARGUMENT

In its decision last year in *Zivotofsky v. Secretary of State*, 725 F.3d 197, the D.C. Circuit relied in substantial part on erroneous dicta that appears in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Although *Curtiss-Wright* concerned legislative – not presidential – authority, Justice George Sutherland added pages of extraneous material to concoct an array of independent, plenary, exclusive, and inherent powers for the President in external affairs. Sutherland wholly mischaracterized a speech given by John Marshall in 1800 when he served in the House of Representatives, distorting his remarks to imply that the President may act in external affairs without legislative authority. In fact, the purpose of Marshall's speech was to defend President John Adams for *carrying out a treaty provision*. Nothing in Marshall's "sole organ" speech promoted independent presidential authority, yet Sutherland pressed that doctrine. His error has remained a potent factor ever since 1936 in expanding presidential authority beyond its constitutional boundaries. In *Curtiss-Wright*, Sutherland advanced other misinterpretations, including false assertions about treaty negotiation and the transfer of sovereignty from Great Britain to the United States. Scholars regularly identify these defects in Sutherland's opinion, but the

Supreme Court has yet to correct his errors. It is time to do so. It is in the interest of the Court and the Nation to adhere to a judicial process that is thoughtful, informed, grounded, and principled, giving proper guidance to lower courts.

ARGUMENT

I. Relying Heavily on Erroneous Dicta from *Curtiss-Wright*

On July 23, 2013, the D.C. Circuit held that congressional legislation in 2002 "impermissibly infringes" on the President's power to recognize foreign governments. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220. The court acknowledged that "[n]either the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power." *Id.* at 206. By what reasoning did the D.C. Circuit decide that an implied executive power to recognize foreign governments is superior to an implied power of Congress to decide passport policy?

On five occasions in its decision, the D.C. Circuit relied on dicta that appears in the Supreme Court's ruling in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Quoting from *Clinton v. City of New York*, 524 U.S. 417, 445 (1998), the D.C. Circuit said the Supreme Court recognized that "in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction

which would not be admissible were domestic affairs alone involved.'" 725 F.3d at 211. Citing *Curtiss-Wright* a second time, the D.C. Circuit claimed that the Supreme Court, "echoing the words of then-Congressman John Marshall, has described the President as the 'sole organ of the nation in its external relations, and its sole representative with foreign nations.'" *Id.* The D.C. Circuit also cited *United States v. Belmont*, 301 U.S. 324, 330 (1937), relying on *Curtiss-Wright* to claim that the President has authority to speak as the "sole organ" of the government in matters of recognition. *Id.* Citing *Belmont* again, the D.C. Circuit referred to the *Curtiss-Wright* "sole organ" doctrine. *Id.* at 213. Toward the end of its decision, the D.C. Circuit returned a fifth time to *Curtiss-Wright* to describe the President as the "sole organ of the nation in its external relations." *Id.* at 219.

In citing *Curtiss-Wright*, the D.C. Circuit admitted it was depending on judicial dicta rather than a judicial holding. Citing language from one of its decisions in 2006, it stated: "To be sure, the Court has not *held* that the President exclusively holds the power [of recognition]. But, for us – an inferior court – carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Id.* at 212. That passage contains two qualifiers: *carefully* and *generally*. As will be explained, the dicta in *Curtiss-Wright* is manifestly careless, as is every subsequent citation to the sole-organ argument. Referring to one of its decisions in

2010, the D.C. Circuit said that dictum is "especially" authoritative if the Supreme Court "has reiterated the same teaching." *Id.* Without doubt the Supreme Court regularly cites the sole-organ doctrine from *Curtiss-Wright*, but no matter how often the Court repeats an error it remains an error and should not be used to decide the scope of presidential constitutional authority. An error, even if frequently repeated, does not emerge as truth.

II. Caveats About Dicta

Courts frequently resort not only to holdings but to dicta. No one expects that custom to end, even if the results can damage the development and reputation of law. After authoring *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), Chief Justice John Marshall expressed concern about the degree to which litigants read the decision carelessly, failing to separate its core holding from "some dicta of the Court." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). When it became evident that attorneys were rummaging around *Marbury* to find nuggets favorable to their cause, he insisted that general expressions in a case "are to be taken in connection with the case in which those expressions are used," and if those expressions "go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Id.* A question before a court must be "investigated with care, and considered to its full extent." *Id.* In *Marbury*, the "single question" before the Court was

"whether the legislature could give this Court original jurisdiction in a case in which the constitution had clearly not given it." *Id.* at 400. That was the core holding. Everything else, including possible claims of judicial supremacy, amounted to dicta. Some of the language in *Marbury* was not only too broad, Marshall said, "but in some instances contradictory to its principle." *Id.* at 401.

Writing in 2006, Judge Pierre N. Leval of the Second Circuit underscored the risks of relying on judicial dicta. After saying it is "sometimes argued that the lower courts must treat the dicta of the Supreme Court as controlling," he added: "The Supreme Court's dicta are not law." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1274 (2006). He explained why dicta can provide weak and misleading guides to the formation of law. First, courts reach a decision after "confronting conflicting arguments powerfully advanced by both sides." When a court (including the Supreme Court) "asserts rules outside the scope of its judgment, that salutary adversity is often absent." *Id.* at 1261.

As a second point, Judge Leval cautioned that when a court asserts a rule of law in dictum, it "will often not have before it any facts affected by that rule. In addition, the lack of concrete facts increases the likelihood that readers will misunderstand the scope of the rule the court had in mind." *Id.* at 1262. Third: "Another weakness of law made through dicta is that there is no available correction mechanism. No

appeal may be taken from the assertion of an erroneous legal rule in dictum. Frequently, what's more, no party has a motive to try to get the bad proposition corrected. No party will even ask the court to reconsider its unfortunate dicta." *Id.*

Fourth, Judge Leval noted that his experience as a judge "has shown me that assertions made in dictum are less likely to receive careful scrutiny, both in the writing chambers and in the concurring chambers. When a panel of judges confers on a case, the judges generally focus on the outcome and on the reasoning upon which the outcome depends. . There is a high likelihood that peripheral observations, alternative explanations, and dicta will receive scant attention." *Id.*

Justice Robert Jackson once described the Supreme Court as having the final word: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953). Chief Justice Rehnquist later described the Court's record with greater clarity and accuracy: "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera v. Collins*, 506 U.S. 390, 415 (1993). A misrepresentation that appears in *Curtiss-Wright* is not a valid source of authority. Courts and scholars should not continue to cite an erroneous secondary source, even if it appears regularly in Supreme Court dicta. Instead, they should revisit a judicial mistake and correct it.

III. False Assertions in *Curtiss-Wright*

Writing for the Supreme Court in *Curtiss-Wright*, Justice George Sutherland said that John Marshall during debate in the House of Representatives in 1800 described the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." 299 U.S. at 319, citing 10 *Annals of Cong.* 613. The word "sole" seems to suggest that the President has exclusive control over external affairs, including the recognition power, but clearly the Framers did not adopt William Blackstone's model that placed all of external affairs with the executive. Louis Fisher, *The Law of the Executive Branch: Presidential Power* 261-64 (2014); Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 265-307 (2009). The Constitution plainly vests many of Blackstone's executive powers expressly in Congress or assigns them jointly to the President and the Senate, as with treaties and appointing ambassadors. What did Marshall mean when he spoke during House debate in 1800? Did he believe that in the field of foreign affairs the President possessed exclusive, plenary, independent, and inherent power? By understanding Marshall's purpose in giving his speech, the answer is clearly no.

IV. Placing *Curtiss-Wright* Dicta in Context

In 1800, Thomas Jefferson campaigned for President against John Adams. Jeffersonians in the House urged that President Adams be either impeached or

censured for turning over to Great Britain an individual charged with murder. Because the case was already pending in an American court, some lawmakers wanted to sanction Adams for encroaching upon the judiciary and violating the doctrine of separation of powers. A House resolution described the decision to turn the accused over to the British as "a dangerous interference of the Executive with Judicial decisions." 10 *Annals of Cong.* 533 (1800). Although critics of Adams claimed that the individual, Jonathan Robbins, was "a citizen of the United States," Secretary of State Timothy Pickering determined that Robbins was using an assumed name and was actually Thomas Nash, a native Irishman. *Id.* at 515. U.S. District Judge Thomas Bee, who was asked to turn the prisoner over to the British, agreed that the individual was Thomas Nash. *Id.*

Marshall took the floor to methodically shred the call for impeachment or censure. The Jay Treaty with England contained an extradition provision in Article 27, providing that each country deliver up to each other "all persons" charged with murder or forgery. President Adams was not making foreign policy unilaterally. He was not the "sole organ" in formulating the treaty. He was the sole organ in *implementing it*. Adams was fulfilling his Article II, § 3, authority to take care that the laws, including treaties, be faithfully executed. National policy for external affairs would be made by the two branches jointly, in this case by treaty and in other cases by statute. At no point did Marshall suggest that the President

possessed some kind of exclusive authority over foreign affairs. After Marshall completed his presentation, Jeffersonians considered his argument so tightly reasoned it could not be refuted. Marshall's full speech is available at http://loufisher.org/docs/pip/444.pdf.

In its February 2014 *Brief for the Respondent in Opposition*, the Justice Department presents contradictory positions on the relative powers of Congress and the President in external affairs. On pages 13 and 23, the Department claims that the President has "plenary and exclusive power * * * as the sole organ of the federal government in the field of international relations," citing *Curtiss-Wright*. Yet on page 13, the Department acknowledges that "the two Branches exercise some foreign-affairs powers jointly," including the power to make and execute treaties and the Article I, § 8, cl. 3 power of Congress "to regulate foreign commerce and the value of foreign currency." On page 10, the Department states that Congress "also possesses the power to regulate passports pursuant to its enumerated powers." Oddly, it later argues that this "enumerated" power of Congress cannot control the President's *implied* power over recognition policy. Page 22 of the Department's brief offers additional Article I support for the power of Congress in external affairs, such as "its powers to regulate foreign commerce and immigration."

V. *Curtiss-Wright* Involved Legislative – Not Presidential – Power

Although the Supreme Court's decision in *Curtiss-Wright* has become a standard citation for the "sole organ" doctrine and the existence of inherent executive power in the field of foreign affairs, the case itself did not concern independent or plenary presidential power. The issue before the judiciary was whether Congress had delegated *legislative* authority too broadly when it authorized the President to declare an arms embargo in South America. A joint resolution by Congress allowed the President to prohibit the sale of arms in the Chaco region whenever he found that it "may contribute to the reestablishment of peace" between belligerents. 48 Stat. 811, ch. 365 (1934).

In imposing the embargo, President Franklin D. Roosevelt relied solely on statutory – not inherent – authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco begins: "NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, ..." 48 Stat. 1745 (1934). The proclamation did not assert the existence of any inherent, independent, plenary, exclusive, or extra-constitutional presidential power.

Litigation on the proclamation focused on legislative power because, during the previous year, the

Supreme Court in two cases had struck down the delegation by Congress of domestic power to the President. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Corp. v. United States*, 295 U.S. 495 (1935). The issue in *Curtiss-Wright* was therefore whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs. A district court, holding that the joint resolution represented an unconstitutional delegation of legislative authority, said nothing about any reservoir of inherent presidential power. *United States v. Curtiss-Wright Export Corp.*, 14 F. Supp. 230 (S.D. N.Y. 1936). It acknowledged the "traditional practice of Congress in reposing the widest discretion in the Executive Department of the government in the conduct of the delicate and nicely posed issues of international relations." *Id.* at 240. Recognizing that need, however, did not justify for the district court the delegation, nor did it recognize any broad capacity of the President as "sole organ" in external affairs.

The district court decision was taken directly to the Supreme Court. None of the briefs on either side discussed the availability of independent or inherent powers for the President. To the Justice Department, regarding the issue of jurisdiction, the question for the Court went to "the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose." *Statement as to Jurisdiction*, United States v. Curtiss-Wright, No. 98, Supreme Court, Oct. Term, 1936, signed by Martin Conboy, Special Assistant to

the Attorney General of the United States, at 7; reprinted at 32 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Kurland & Casper, eds., 1975), at 898 (hereafter "Landmark Briefs"). The government's brief focused on whether the district court erred in holding that the joint resolution "constitutes an improper delegation of legislative power to the President." *Statement as to Jurisdiction*, at 2; 32 Landmark Briefs 906. The government argued that previous decisions by the Supreme Court, including those in the field of foreign relations, supported the delegation of this legislative power to the President." *Id.* at 6; 32 Landmark Briefs 910. Past delegations covering the domain of foreign relations represented "a valid exercise of legislative authority." *Id.* at 8; 32 Landmark Briefs 912. The joint resolution, said the government, contained adequate standards to guide the President and did not fall prey to the "unfettered discretion" found by the Court in the 1935 *Panama Refining* and *Schechter* decisions. *Id.* at 16; 32 Landmark Briefs 920. The government's brief consistently regarded the source of authority as legislative, not executive.

The brief for the private company, Curtiss-Wright, also concentrated on the issue of delegated legislative power and did not explore the existence of independent or inherent presidential power. The brief charged that the joint resolution (1) represented an unlawful delegation of legislative power, (2) did not go into operation because the President's proclamation

failed to contain all the findings required by the joint resolution, (3) the President could not have consulted other governments as contemplated by the joint resolution, and (4) the effect of the President's second proclamation of November 14, 1935 extinguished the alleged liability of private companies involved in selling arms and munitions abroad. *Brief for Appellees*, Curtiss-Wright Export Corp. and Curtiss Aeroplane & Motor Co., Inc., United States v. Curtiss-Wright Export Corp., No. 98, Supreme Court, Oct. Term, 1936, at 3; 32 Landmark Briefs 937. A separate brief, prepared for other private parties, also analyzed the delegation of *legislative* power. *Brief for Appellees*, John S. Allard, Clarence W. Webster & Samuel J. Abelow, United States v. Curtiss-Wright Export Corp., No. 98, Supreme Court, Oct. Term, 1936, at 3-5; 32 Landmark Briefs 979-81.

VI. Sutherland's Political Views as U.S. Senator

There was no need for the Supreme Court in 1936 to explore the existence of independent, inherent, or exclusive presidential powers. Nevertheless, in extensive dicta, the decision for the Court by Justice George Sutherland went far beyond the specific issue before the Court and discussed extra-constitutional powers of the President. Many of the themes in the decision were drawn from Sutherland's writings as a U.S. Senator from Utah. According to his biographer, Sutherland "had long been the advocate of a vigorous diplomacy which strongly, even belligerently, called always for an assertion of American rights. It was

therefore to be expected that [Woodrow] Wilson's cautious, sometimes pacifistic, approach excited in him only contempt and disgust." Joel Francis Paschal, *Mr. Justice Sutherland: A Man Against the State* 93 (1951).

Justice Sutherland had been a two-term Senator from Utah, from March 4, 1905 to March 3, 1917, and served on the Senate Foreign Relations Committee. His opinion in *Curtiss-Wright* closely tracks his article, "The Internal and External Powers of the National Government," printed as a Senate document in 1910. S. Doc. No. 417, 61st Cong., 2d Sess. (1910). The article began with this fundamental principle: "That this Government is one of *limited* powers, and that absolute power resides nowhere except in the people, no one whose judgment is of any value has ever seriously denied. . . " *Id.* at 1 (emphasis in original).

Yet subsequent analysis in the article moved in the direction of independent presidential power that could not be checked or limited by other branches, even by the people's representatives in Congress. He first faulted other studies for failing "to distinguish between our *internal* and our *external* relations." *Id.* (emphasis in original). With regard to external relations, Sutherland argued that after the Declaration of Independence, the American colonies lost their character as free and independent states and that national sovereignty passed then to the central government. *Id.* Sutherland's article in 1910 connected external matters with the national government, *id.* at 12, but

in *Curtiss-Wright* he associated national sovereignty and external affairs with the presidency, greatly expanding executive power. In addition to identifying express and implied constitutional powers in his article, Sutherland also spoke of "inherent" powers and "extra-constitutional" powers. *Id.* at 8-9.

The same themes appear in Sutherland's book, *Constitutional Power and World Affairs*, published in 1919. He again distinguishes between internal and external powers (*id.* at 26) and insists that in carrying out military operations the President "must be given a free, as well as a strong hand. The contingencies of war are limitless – beyond the wit of man to foresee. . . To rely upon the slow and deliberate processes of legislation, after the situation and dangers and problems have arisen, may be to court danger – perhaps overwhelming disaster" (*id.* at 111). Earlier in the book he warned against "the danger of centralizing irrevocable and absolute power in the hands of a single ruler" (*id.* at 25), and said that in "all matters of external sovereignty" with regard to the general government the "result does not flow from a claim of inherent power" (*id.* at 47).

Later passages of the book, however, vested in the President as Commander-in-Chief a power that is supreme: "Whatever any Commander-in-Chief may do under the laws and practices of war as recognized and followed by civilized nations, may be done by the President as Commander-in-Chief. In carrying on hostilities he possesses sole authority, and is charged with sole responsibility, and Congress is excluded

from any direct interference" (*id.* at 74-75). In time of war, Sutherland concluded that traditional rights and liberties had to be relinquished: "individual privilege and individual right, however dear or sacred, or however potent in normal times, must be surrendered by the citizen to strengthen the hand of the government lifted in the supreme gesture of war. Everything that he has, or is, or hopes to be – property, liberty, life – may be required" (*id.* at 98). Statutes enacted during World War I invested President Wilson "with virtual dictatorship over an exceedingly wide range of subjects and activities" (*id.* at 115). Sutherland spoke of the need to define the powers of external sovereignty as "unimpaired" and "unquestioned" (*id.* at 171).

VII. Problems with Sutherland's Opinion in *Curtiss-Wright*

Writing for the Court in *Curtiss-Wright*, Justice Sutherland reversed the district court and upheld the delegation of legislative power to the President to place an embargo on arms or munitions to the Chaco. To Sutherland, the two categories of external and internal affairs are different "both in respect of their origin and their nature." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936). The principle that the federal government is limited to either enumerated or implied powers "is categorically true only in respect of our internal affairs." *Id.* at 316. The purpose, he said, was "to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in

the federal government, leaving those not included in the enumeration still in the states." *Id.* (emphasis in original). But that doctrine, Sutherland insisted, "applies only to powers which the states had . . . since the states severally never possessed international powers. . . ." *Id.* That is false. As will be explained, states did possess and exercise sovereign powers.

To reach his conclusion, Sutherland said that after the Declaration of Independence "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." *Id.* By transferring external or foreign affairs directly to the national government and associating foreign affairs with the executive, Sutherland positioned himself to advance a broad definition of inherent presidential power.

There are multiple problems with Sutherland's analysis. First, external sovereignty did not circumvent the colonies and the independent states and pass directly to the national government. When Great Britain entered into a peace treaty with America, the provisional articles of November 30, 1782 were not with a national government because a national government did not yet exist. Instead, "His Brittanic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia," referring to them as "free, sovereign

and independent States." 8 Stat. 55 (1782). The colonies formed a Continental Congress in 1774. It provided a form of national government until passage of the Articles of Confederation, ratified in 1781, and adoption of the U.S. Constitution.

Until that time, the states operated as sovereign entities in making treaties and exercising other powers that would pass to the new national government in 1789. The Supreme Court has frequently recognized that the American colonies, upon their separation from England, exercised the powers of sovereign and independent governments. *United States v. California*, 332 U.S. 19, 31 (1947); *Texas v. White*, 74 U.S. 700, 725 (1869); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cr.) 209, 212 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222-24 (1796).

Second, sovereignty and external affairs did not pass from Great Britain to the U.S. President. In 1776, at the time of America's break with England, there was no President and no separate executive branch. Only one branch of government – the Continental Congress – functioned at the national level. It carried out all governmental powers, including legislative, executive, and judicial. Louis Fisher, *President and Congress* 1-27, 253-70 (1972). When the new national government under the U.S. Constitution began in 1789, sovereign powers were not placed solely in the President. They were divided between Congress and the President, with ultimate sovereignty vested in the people.

Much of *Curtiss-Wright* is devoted to Sutherland's discussion about independent and inherent presidential powers in foreign affairs. Having made the distinction between external and internal affairs, he wrote: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerful to invade it." 299 U.S. at 319 (emphasis in original).

In his book, Sutherland took a less doctrinaire and theoretical position on treaty negotiation. He recognized that Senators did in fact participate in the negotiation phase and that Presidents often acceded to this "practical construction." Sutherland, *Constitutional Power and World Affairs*, at 122-24. With regard to treaty-making, the power of the Senate "is co-ordinate, throughout, with that of the President. *Id.* at 123. See also Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. Pa. L. Rev. 1511 (1989), and Louis Fisher, *The Law of the Executive Branch: Presidential Power* 272-76, 286 (2014).

In *Curtiss-Wright*, Sutherland quotes John Marshall out of context, implying a scope of presidential power that Marshall never embraced. Marshall said during House debate: "The President is the sole organ of the nation in external relations, and its sole representative with foreign nations." 299 U.S. at 319.

Justice Sutherland developed for the President a source of power in foreign affairs that was not grounded in authority delegated by Congress or extended to the President expressly or by implication by the Constitution:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment – perhaps serious embarrassment – is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. *Id.* at 319-20.

In liberating the President from statutory grants of power and legislative restrictions, Justice Sutherland did not explain how the exercise of presidential power would be constrained by requiring that it "be

exercised in subordination to the applicable provisions of the Constitution." Which provisions in the Constitution could check or override presidential decisions? On that fundamental issue he was silent. Justice McReynolds' dissent was brief: "He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed." *Id.* at 333.

Justice Stone did not participate. He later wrote to Edwin M. Borchard, a prominent law professor: "I have always regarded it as something of a misfortune that I was foreclosed from expressing my views in . . . *Curtiss-Wright* . . . because I was ill and away from the Court when it was decided." Letter from Stone to Borchard, Feb. 11, 1942, Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress. In another letter to Borchard, Stone said he "should be glad to be disassociated" with Sutherland's opinion." Letter from Stone to Borchard, May 13, 1937, Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress. Borchard advised Stone that the Court, in such cases as *Curtiss-Wright*, "has attributed to the Executive far more power than he had ever undertaken to claim." Letter from Borchard to Stone, Feb. 9, 1942, Papers of Harlan Fiske Stone, Container No. 6, Manuscript Room, Library of Congress.

In discussing Marshall's 1800 speech in *Curtiss-Wright*, Justice Sutherland did not engage merely in dicta. He committed plain judicial error, yet his language is routinely cited by the Supreme Court,

lower courts, the Justice Department, and various scholars. They do not read the entire speech to understand the breadth of his misinterpretation and deliberate effort, through deceit, to inflate presidential power in foreign affairs. Louis Fisher, *Judicial Errors That Magnify Presidential Power*, 61 The Federal Lawyer 66 (Jan-Feb 2014). One of the weaknesses of the judicial process is that once a historical misconception enters a decision, including one by the Supreme Court, it can remain there for decades and be cited repeatedly as an authoritative source without any steps to correct the error. Any institution, including the federal judiciary, is damaged publicly and internally when it lacks the capacity to identify and rectify mistakes.

VIII. Scholarly Evaluations of *Curtiss-Wright*'s Dicta

Scholars who have studied *Curtiss-Wright* have thoroughly repudiated Justice Sutherland for his careless and false mischaracterization of Marshall's speech in 1800 and Sutherland's erroneous understanding of the shift of sovereign authority to the United States after the break with England in 1776. In a 1938 article, Julius Goebel, Jr., took Sutherland to task for ignoring "the theory of control over foreign affairs both before and under the Confederation." Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 Colum. L. Rev. 555, 572 (1938). Instead, Sutherland chose "to frame an opinion in language closely parallel to the description of royal

prerogative in foreign affairs in the *Ship Money Case*." *Id.* at 572-73. A footnote to this British case in 1637 explores the king's exclusive control over external affairs, a theory of government that the American Framers considered and rejected. *Id.* at 573, n.50.

Writing in 1944, C. Perry Patterson described Sutherland's belief in the existence of inherent presidential power as "(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous." C. Perry Patterson, *In Re the United States v. The Curtiss-Wright Corporation*, 22 Tex. L. Rev. 286, 297 (1944). Two years later, David M. Levitan noted that "the whole theory and a great amount of its phraseology had become engraved on Mr. Sutherland's mind before he joined the Court, waiting for the opportunity to be made the law of the land." David M. Levitan, *The Foreign Relations Powers: An Analysis of Mr. Sutherland's Theory*, 55 Yale L.J. 467, 478 (1946). Levitan regarded Sutherland's theory as "the furthest departure from the theory that [the] United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power." *Id.* at 493. Sutherland's doctrine "makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol." *Id.* at 497.

In the *Yale Law Journal* in 1973, Charles A. Lofgren analyzed John Marshall's 1800 speech and concluded it would be difficult to extract "an endorsement of unlimited executive discretion in foreign

policy-making." Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 Yale L.J. 1, 25 (1973) (emphasis in original). He said that Sutherland "uncovered no constitutional ground for upholding a broad, inherent, and independent presidential power in foreign relations." *Id.* at 30. To Lofgren, Marshall "evidently did not believe that because the President was the sole organ of communication and negotiation with other nations, he became the sole foreign policy-maker." *Id.* Sutherland's opinion in *Curtiss-Wright* "does not support the existence of an extra-constitutional base for federal authority, broad independent executive authority, or laxness in standards governing delegation. It certainly invests the President with no sweeping and independent *policy* role." *Id.* at 32 (emphasis in original).

Michael Glennon referred to the "extravagant scheme concocted by Justice George Sutherland, first unveiled in his earlier writings and later, in 1936, transposed into a Supreme Court opinion, and unleashed upon the nation in *United States v. Curtiss-Wright Export Corp.*" Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power*: Little v. Barreme or Curtiss-Wright?, 13 Yale J. Int'l L. 5, 11 (1988). Sutherland discussed the "sole organ" statement from Marshall "with no reference to its limiting context." *Id.* at 12. Glennon described Sutherland's opinion as "a muddled law review article wedged with considerable difficulty between the pages of United States Reports." *Id.* at 13. Sutherland's interpretation

of the sole-organ speech "mistakes policy communication for policy formulation." *Id.* at 14.

David Gray Adler developed a similar point in dismissing Sutherland's dicta as a "bizarre reading of Anglo-American legal history." David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 Pol. Sci. Q. 1, 30 (1988). He found no factual foundation for Sutherland's assertion that domestic and foreign affairs are different, "both in respect of their origin and nature," and that foreign affairs somehow passed directly from the crown to the President when in fact it passed to the colonies as sovereign entities." *Id.* By misinterpreting Marshall's speech, Sutherland attempted to infuse "a purely communicative role with a substantive policy-making function." *Id.* at 34.

In a report for the Law Library of Congress in August 2006 and a journal article published the following year, Louis Fisher explained that Marshall's speech did not support an independent, extra-constitutional or exclusive power of the President in foreign relations. The concept of an executive having sole power over foreign relations borrows from other sources, including the British model of a royal prerogative that gave the king plenary power over external affairs. Louis Fisher, *The "Sole Organ" Doctrine*, Law Library of Congress, Aug. 2006, http://loufisher.org/docs/pip/441.pdf; Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 Pres. Stud. Q. 139 (2007), http://loufisher.org/docs/pip/439.pdf.

Fisher's book on *Presidential War Power* includes a section that identifies the false history and theory promoted by Justice Sutherland's dicta in *Curtiss-Wright*. Louis Fisher, *Presidential War Power* 68-72 (3d ed. 2013). Similarly, Fisher's treatise on *The Law of the Executive Branch: Presidential Power* (2014) devotes several sections to misconceptions about presidential inherent power, treaty negotiation, and the "sole organ" doctrine (*id.* at 68-73, 265-68, 272-76, 286).

IX. John Marshall's Understanding of Congressional Authority as Chief Justice

At no time in John Marshall's lengthy public career did he promote exclusive presidential power over foreign affairs. In his capacity as Chief Justice of the Supreme Court from 1801 to 1835, he insisted that the making of foreign policy is a joint exercise by the executive and legislative branches, acting through treaties and statutes. The President did not possess exclusive authority. Blackstone's theory of external relations, the British royal prerogative, and the concept of plenary executive power in foreign affairs did not appear in Marshall's decisions. With the war power, for example, Marshall looked solely to Congress – not the President – for the authority to take the country to war against another power and to place constraints on the President's actions as Commander-in-Chief.

Chief Justice Marshall wrote for the Court in *Talbot v. Seeman*, a case involving salvage of the ship *Amelia* during the Quasi-War with France. 5 U.S. (1 Cr.) 1 (1801). Part of the decision turned on the war's undeclared nature. A series of statutes passed by Congress authorized President John Adams to use military force against France, but there had been no formal declaration of war. The previous year the Court in *Bas v. Tingy* decided that Congress could authorize hostilities either by formal declaration or by statutory authority. 4 U.S. (4 Dall.) 36 (1800).

In *Talbot*, the captain of a U.S. ship of war captured a merchant ship that the French had earlier seized. The owner of the ship sued the captain. Chief Justice Marshall ruled in favor of the captain. To decide the case, it was necessary to examine the relationship between the United States and France at the time. To do that, Marshall looked for constitutional guidance to statutory policy: "To determine the real situation in regard to France, the acts of congress are to be inspected." 5 U.S. (1 Cr.) at 28. He had no difficulty in identifying the branch of government authorized to settle this issue of external affairs: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry." *Id.*

In *Little v. Barreme* (1804), Chief Justice Marshall ruled that when a presidential proclamation issued in time of war is contrary to a statute passed by Congress, the statute prevails. As part of legislation

involving the Quasi-War, Congress authorized the President to instruct naval commanders to stop, examine, and seize suspected U.S. ships "sailing *to* any port or place within the territory of the *French* republic or her dependencies. . . ." 2 Cr. (6 U.S.) 170, 177 (emphasis in original). President Adams issued a proclamation directing naval commanders to stop and examine ships sailing "to, or from" French ports. *Id.* at 178. Marshall ruled that presidential "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 179. Speaking for a unanimous Court, Marshall regarded the statute as superior to the proclamation. In *Zivotofsky*, the D.C. Circuit not only deferred to the executive branch (which Marshall did not) but held that an agency manual – the State Department's *Foreign Affairs Manual* – was superior to a statute.

In one section of *Marbury v. Madison*, Chief Justice Marshall distinguished between two types of presidential action: one that is independent of judicial control and another that is governed by statute. Under the Constitution, the President "is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience." 5 U.S. (1 Cr.) 137, 165 (1803). With regard to political matters that do not affect individual rights, "the decision of the executive is conclusive." *Id.*

However, when Congress proceeds by statute to impose on an executive officer "other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion sport away the vested rights of others." *Id.* at 165-66. In cases where a "specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166. Under these conditions, the executive officer's duty is to the law, not to the President. Following Marshall's reasoning, the statutory rights of private parties in *Zivotofsky* should prevail over the conflicting policies contained in a State Department manual.

X. Unsound Stances by the Executive Branch on this Statute

In signing a bill in 2002 that contained language on Jerusalem passports, President George W. Bush stated that if Section 214 were construed to impose a legislative requirement, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act*, Fiscal Year 2003, 2002 Pub. Papers

of the Presidents of the United States: George W. Bush 1697, 1698 (Sept. 30, 2002), cited by the Justice Department in *Brief for the Respondent in Opposition*, *Zivotofsky v. Kerry*, No. 13-628, at 6.

First, we treat as law what appears in a statute, not what is said in a signing statement. *DaCosta v. Nixon*, 55 F.R.D. 145 146 (E.D. N.Y. 1972); Fisher, *The Law of the Executive Branch*, at 191-96. Second, the remarks by President Bush highlight a number of widespread misconceptions. He said that Section 214 would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States." Formulation of public policy in external affairs is a constitutional duty assigned to both elected branches, as the Justice Department acknowledges in its brief cited above. As the Justice Department noted, Congress "also possesses the power to regulate passports pursuant to its enumerated powers." *Brief for the Respondent in Opposition*, at 10. The Justice Department added: that the Constitution "provides that the two Branches exercise some foreign-affairs powers jointly." *Id.* at 13.

Third, President Bush said that Section 214 interferes with the President's authority to "speak for the Nation in international affairs," an apparent allusion to John Marshall's "sole organ" speech in 1800. But as pointed out by scholars in Section VIII of this *amicus* brief, the authority to speak and communicate is not the authority to *make* policy over external affairs. Policy communication is separate from policy formulation. The two elected branches

share in the formulation of policy. The President communicates it.

Fourth, the signing statement by President Bush claimed that Section 214 interferes with the President's authority to "determine the terms on which recognition is given to foreign states," suggesting that the recognition power is vested solely in the President under Article II of the Constitution. There is no evidence that the Framers vested the recognition power in the President, "and certainly not a power that is plenary in nature." Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 862 (2011). Yet according to the Justice Department, from "the Washington Administration to the present, the Executive Branch has asserted sole authority to determine whether to recognize foreign states and governments, as well as their territorial boundaries, and Congress has acquiesced in that understanding." *Brief for the Respondent in Opposition*, at 14.

The Justice Department appropriately selects the verb "asserted," but assertions are merely that. They fall short of evidence. They represent only a claim by one party. In this case, the assertion by the Justice Department is itself incorrect. The historical record amply demonstrates that Presidents have not consistently claimed exclusive recognition power and Congress has not acquiesced in that assertion.

Contrary to the Justice Department claim, President George Washington was more modest and circumspect about his power over foreign affairs, including the recognition power. When Washington recognized the new French revolutionary government, he did not rely on broad theories of Article II power or the existence of plenary, inherent, and exclusive presidential control over external affairs. Instead, he followed the law of nations and Vattel's doctrine of de facto recognition. If a government was in "actual possession" of the instruments of national power, it was "entitled to be recognized by other states." Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 424 (2012). Washington issued his Neutrality Proclamation, warning U.S. citizens that they faced prosecution for acting against the law of nations by becoming involved in hostilities against nations at war. *Id.* at 430 n.267.

Washington then discovered the limits of independent executive power. Although individuals were prosecuted by the administration, indicted by grand juries, and all with the support of federal judges, jurors objected to finding someone guilty of a crime that lacked a statutory basis. Washington's initiative smacked too much of monarchical powers rejected by the Framers. On a regular basis, jurors returned a verdict of not guilty. *Id.* at 439. Facing this pattern of acquittals, Washington turned to Congress for statutory authority, supplied by the Neutrality Act of 1794. *Id.* at 440.

In place of the Justice Department narrative, it is more accurate to say that Congress has also exercised the recognition power and that Presidents have acquiesced in that legislative judgment. The historical evidence in the post-ratification period from Washington to the present time does not support a plenary recognition power in the President. Executive recognition decisions "are not exclusive but are subject to laws enacted by Congress." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 60 (2013).

The Justice Department correctly notes that in a number of cases the Supreme Court has deferred to executive branch determinations over recognition power. *Brief for the Respondent in Opposition*, at 19-20. Unlike Congress, the federal judiciary is not assigned an array of constitutional powers over external affairs and foreign policy. Acquiescence by the Supreme Court does not require acquiescence by Congress.

CONCLUSION

This case presents two competing jurisprudential visions. One promotes the President as the sole authority to decide national policy regarding U.S. relations with foreign nations. That is the theory advanced by the D.C. Circuit, rooted in *Curtiss-Wright* dicta. The competing vision is one where Congress and the President concurrently exercise

power over external affairs, with neither branch possessing exclusive, plenary, or inherent authority. This brief has analyzed the sources of the first vision, finding it legally hollow and unsound. For these reasons, this brief suggests that the Court not be misled by the analysis of the D.C. Circuit and that it take steps to correct the erroneous dicta that appear in *Curtiss-Wright*, errors that have misguided federal courts, the Justice Department, Congress, some scholarly studies, and the general public.

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AMICUS CURIAE BRIEF

No. 13-628

RECORD AND BRIEFS

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In The
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.) AS *AMICUS CURIAE* SUPPORTING PETITIONER AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The International Association of Jewish Lawyers and Jurists (R.A.) ("IAJLJ") was founded in 1969. Among its founders were Israel Supreme Court Justice Haim Cohn, U.S. Supreme Court Justice Arthur Goldberg, and Nobel Prize laureate René Cassin of France, one of the architects of the Universal Declaration of Human Rights.

IAJLJ strives to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international cooperation based on the rule of law and the fair implementation of international covenants and conventions. IAJLJ is especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial, and negation of the State of Israel.

IAJLJ has a strong interest in United States policy toward Israel and Jerusalem – Israel's capital and a city that has been central to the Jewish faith for more than 3,000 years. Both Congress and the Executive Branch play a vital role in shaping United

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[1] This brief *amicus curiae* is filed with the consent of all parties. Counsel for *amicus* affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than *amicus* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

States policy toward Israel, and it is important to strike the proper balance between those two branches of government. In IAJLJ's view, the opinion of the United States Court of Appeals for the D.C. Circuit in this case does not strike the right balance and should be reversed.

SUMMARY OF ARGUMENT

The International Association of Jewish Lawyers and Jurists submits this brief in support of Petitioner and urges reversal of the decision of the United States Court of Appeals for the D.C. Circuit.

On remand, the D.C. Circuit once again improperly deferred to the State Department on the issue of whether Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly conflicts with Executive power.

Properly viewed, there is no conflict. Section 214(d) does not require the Executive to change its repeatedly enunciated position with respect to Jerusalem, nor does it enunciate a contrary position. It does nothing more than allow U.S. citizens born in Jerusalem to express their own view on the issue by choosing how to describe their place of birth in their passport.

ARGUMENT

I. THE D.C. CIRCUIT IMPROPERLY DEFERRED TO THE STATE DEPARTMENT'S VIEW THAT THERE IS A CONFLICT BETWEEN SECTION 214(d) AND THE EXECUTIVE'S "RECOGNITION POWER"

To borrow a phrase from Yogi Berra, the Court of Appeals for the D.C. Circuit's opinion on remand is "déjà vu all over again."

In its first opinion, the D.C. Circuit refused to decide whether the Executive's "recognition" authority allowed the State Department to nullify an act of Congress allowing American citizens born in Jerusalem to have their passports state their place of birth as "Jerusalem, Israel." The court concluded: "The President's exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009) ("*Zivotofsky I*").

This Court disagreed, stating:

> At least since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province of the judicial department to say what the law is." *Id.*, at 177. That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have

> political implications." *INS v. Chadha*, 462 U.S. 919, 943 (1983).

Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427-28 (2012).

On remand, however, the D.C. Circuit shirked its responsibility again. Although it no longer invoked the "political question" doctrine, the court again simply deferred to the State Department as to whether Section 214(d) impermissibly conflicts with the Executive's foreign policy powers – the constitutional question that this Court ruled was an issue for the Judiciary, not the Executive. Thus, the D.C. Circuit ruled:

> [W]e are not equipped to second-guess the Executive regarding foreign policy consequences of section 214(d). As the Executive – the "sole organ of the nation in its external relations" – is the one branch of the federal government before us and both the current Executive branch as well as its predecessor believe that section 214(d) would cause adverse foreign policy consequences (and in fact presented evidence that it had caused foreign policy consequences), that view is conclusive on us.

Zivotofsky ex rel. Zivotofsky v. Sec'y of State, 725 F.3d 197, 219 (D.C. Cir. 2013) ("*Zivotofsky II*") (internal citations omitted).

That decision is wrong, and dangerously tilts the separation of powers in favor of the Executive not

only vis-à-vis Congress, but vis-à-vis the Judiciary as well. As this Court stated, it is the responsibility of the courts to interpret the law, particularly when a conflict is claimed between one branch of government and another. "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

The courts may not abdicate that responsibility and simply defer to the Executive's own say-so that an act of Congress conflicts with Executive authority. The D.C. Circuit's ruling effectively gives the Executive the power to disregard any legislation at all, simply on the Executive's own say-so that the legislation conflicts with the Executive's own approach to foreign policy, and on the Executive's own say-so that some overseas constituency finds the legislation objectionable.

As Justice Brandeis wrote: "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing on the validity of an act of Congress." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345 (1936) (concurring opinion). Similarly, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Court ruled: "'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by

the President . . . it should only do so for the most compelling constitutional reasons.'" *Id.* at 384 (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (opinion concurring in judgment)).[2]

The D.C. Circuit identified no compelling reason to invalidate Section 214(d). By simply deferring to the Executive, the D.C. Circuit acted with neither gravity nor delicacy, but rather curtailed both its own judicial function and Congress' legislative function in one fell swoop.

As Justice Powell wrote, this Court "has been mindful that the boundaries between each branch [of government] should be fixed 'according to common sense and the inherent necessities of the governmental coordination.'" *INS v. Chadha*, 462 U.S. 919, 962 (1983) (concurring opinion) (quoting *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928)).

II. PROPERLY VIEWED, THERE IS NO CONFLICT WITH EXECUTIVE AUTHORITY

A common sense approach shows that there is no conflict between Section 214(d) and the Executive's

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[2] *See also Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("Whenever called upon to judge the constitutionality of an Act of Congress – 'the gravest and most delicate duty that this Court is called upon to perform,' – the Court accords 'great weight to the decisions of Congress.'" (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.) and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973)).

"recognition power" or any other purportedly exclusive Executive authority in the area of foreign affairs.

The State Department asserts that Section 214(d) "runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem. Since 1948, American presidents have steadfastly declined to recognize any foreign nation's sovereignty over that city." *Zivotofsky II*, 725 F.3d at 216-17. Common sense suggests otherwise.

Section 214(d) provides simply that, if a United States citizen born in Jerusalem wants his or her passport to list his or her place of birth as "Jerusalem, Israel," the Passport Office must honor that request. It does not provide that, in so doing, the United States itself recognizes Jerusalem as the capital of Jerusalem or as Israeli territory. It simply grants U.S. citizens born in Jerusalem the right to make such a claim themselves by identifying their birthplace as "Jerusalem, Israel" in their passport.

No one could reasonably interpret such an entry in Menachem Zivotofsky's passport as stating the official position of the United States on Jerusalem when, as the D.C. Circuit itself recognized, "Presidents from Truman on have consistently declined to recognize Israel's – or any country's – sovereignty over Jerusalem." *Zivotofsky II*, 725 F.3d at 200. Thus, for example:

- In proceedings before the United Nations in 1967, the United States ambassador stated that the "continuing policy of the United States Government"

was that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned." *Id.* at 200.

- In 1980, President Jimmy Carter stated: "As to Jerusalem, we strongly believe that Jerusalem should be undivided, with free access to the holy places for all faiths, and that its status should be determined in negotiations for a comprehensive peace settlement."[3]

- In 1982, President Ronald Reagan stated: "[W]e remain convinced that Jerusalem must remain undivided, but its final status should be decided through negotiations."[4]

- In 1992, President George Bush stated: "Let me just say that our policy on Jerusalem remains unchanged. It must never be divided again, and its final status must be resolved through negotiation."[5]

- In 2010, Secretary of State Hillary Clinton stated that the status of Jerusalem is a "permanent

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[3] AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1977-1980 (1983), "Statement by the President, March 3, 1980, Explanation of the United States Vote for the Security Council Resolution on the Occupied Territories," p. 705.

[4] Address to the Nation on United States Policy for Peace in the Middle East, September 1, 1982, http://www.cmep.org/content/reagan-peace-initiative-september-1-1982.

[5] President George H. W. Bush, News Conference with Israeli PM Yitzhak Rabin, August 11, 1992, https://www.jewishvirtuallibrary.org/jsource/US-Israel/Bush_Rabin1.html.

status issue[ ]" that must be resolved through "good faith negotiations [between] the parties."[6]

- In 2012, White House spokesman Jay Carney issued a written statement saying: "The status of Jerusalem is an issue that should be resolved in final status negotiations between Israelis and Palestinians."[7]

And if those pronouncements of official United States policy were not clear enough, President George W. Bush clarified the issue once and for all when he signed into law the very act at issue in this case, the Foreign Relations Authorization Act, Fiscal Year 2003. Even as he signed the legislation into law, he stated unequivocally: "*U.S. policy regarding Jerusalem has not changed.*" Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2002 WL 31161653 (Sept. 30, 2002) (emphasis added).

Thus, if Section 214(d) posed any potential conflict with the Executive's "recognition power" by suggesting that U.S. policy in regard to Jerusalem may have changed, President Bush removed that potential conflict *ab initio* by stating unequivocally that U.S. policy regarding Jerusalem had *not* changed.

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[6] http://www.state.gov/secretary/rm/ 2010/03/ 138722.htm.

[7] Press Briefing by Press Secretary Jay Carney, July 26, 2012, http://www.whitehouse.gov/the-press-office/2012/07/26/press-briefing-press-secretary-jay-carney-72612. The Justice Department's brief in opposition to the petition for certiorari contains citations to additional presidential statements along the same lines. *See* Brief for Respondent in Opposition, at p.2 n.1.

If any foreign power or constituency wants to know the position of the United States in regard to Jerusalem, the place to find it is in the President's signing statement and other policy statements emanating from the White House and the State Department – not in Menachem Zivotofsky's passport. Sustaining Section 214(d) thus "would not compromise the President's ability to speak with one voice for the Nation." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 442 (2003) (dissenting opinion of Justice Ginsburg).

Further, it appears that, as senators, Secretary of State Kerry and former Secretary of State Hillary Clinton – the current and former defendants in this case – themselves saw no conflict between Section 214(d) and Executive authority. Then-Senator Kerry was one of the Senate Managers in the Conference Committee that reported the legislation (along with then-Senators Joe Biden (now Vice President) and Chuck Hagel (now Secretary of Defense)).[8] And the Senate, which, at the time, included both then-Senator Kerry and then-Senator Clinton, then approved the legislation by unanimous consent.[9]

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[8] 148 CONG. REC. H6470 (daily ed. Sept. 23, 2002); 148 CONG. REC. S9401-9404 (daily ed. Sept. 26, 2002).

[9] Bill Summary & Status, 107th Congress (2001-2002), H.R. 1646, All Congressional Actions, September 26, 2002 ("Senate agreed to conference report by Unanimous Consent."), http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR 01646:@@@X.

"Congress is a coequal branch of government whose Members take the same oath [as the members of the Supreme Court] do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). It must be presumed, therefore, that Senators Kerry and Clinton would not have voted for the legislation if they believed it posed an unconstitutional conflict with Executive authority.

Indeed, one of the biggest ironies in this case is that, not only did Secretary Kerry and former Secretary Clinton support this legislation when they were senators, but they and other members of the current administration have themselves stated publicly that Jerusalem is Israel's capital and should be recognized as such. For example, as a senator, Secretary Kerry joined 92 other senators in sending a letter to then-Secretary of State Warren Christopher stating: "We believe that Jerusalem is and shall remain the undivided capital of the State of Israel," and that "[t]he search for peace [will] only be hindered by raising utterly unrealistic hopes about the future status of Jerusalem among the Palestinians."[10]

Similarly, then-Senator, now Vice President Joe Biden stated in 1995 that "it is unconscionable for us to refuse to recognize the right of the Jewish people

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[10] 141 CONG. REC. S15476 (daily ed. Oct. 23, 1995).

to choose their own capital. . . . Regardless of what others may think, Jerusalem is the capital of Israel."[11]

And former Secretary Clinton, the original defendant in this case, wrote in a position paper in 2007 that "Israel's right to exist in safety as a Jewish state, with defensible borders and *an undivided Jerusalem as its capital* . . . must never be questioned."[12]

Simply allowing Menachem Zivotofsky and other U.S. citizens born in Jerusalem the right to have their passports describe their birthplace as "Jerusalem, Israel," as Congress has authorized them to do, is no more of a "conflict" with U.S. foreign policy than Secretary Kerry's, former Secretary Clinton's, and Vice President Biden's own statements on this issue.

The D.C. Circuit expressed concern about the State Department's assertion that "various Palestinian groups issued statements asserting that section 214 'undermine[d] the role of the U.S. as a sponsor of the peace process,' 'undervalue[ed] . . . Palestinian, Arab and Islamic rights in Jerusalem' and 'rais[ed] question about the real position of the U.S. Administration vis-à-vis Jerusalem.'" *Zivotofsky II*, 725 F.3d at 218.

As an initial matter, the D.C. Circuit cited no evidence that any Palestinian group was responding to

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[11] 141 CONG. REC. S15533 (daily ed. Oct. 24, 1995).

[12] http://dfi.10point10.com/files/HillaryonIsrael.pdf (emphasis added).

Section 214(d), the only section of the legislation at issue here, as opposed to Section 214(a), which urges the President to begin the process of relocating the United States Embassy in Israel to Jerusalem. In any event, both the State Department and the D.C. Circuit surely must know that "various Palestinian groups" oppose *everything* Congress does that, in their jaundiced view, is favorable to Israel.

Just as the D.C. Circuit should not have deferred to the State Department on the issue of whether Section 214(d) impermissibly conflicts with Executive authority, it should not have deferred to the views of "various Palestinian groups" on that issue, either. The courts may not give the State Department *carte blanche* to disregard duly enacted legislation simply because it may displease some group whose views are of concern to the State Department, without a court making its own determination as to whether a true conflict with Executive authority exists.

Virtually every matter that Congress acts upon – whether it be the environment, civil rights, health care, or the economy – may be objectionable to some overseas constituency on one ground or another. That cannot be a sufficient ground for the State Department to override such legislation with no judicial scrutiny whatsoever – which was the D.C. Circuit's approach.

The D.C. Circuit was also swayed by evidence that "[v]arious members of Congress explained that the purpose of section 214(d) was to affect United

States policy toward Jerusalem and Israel." 725 F.3d at 218.

In fact, however, none of the statements the D.C. Circuit quotes deals specifically with Section 214(d), as opposed to the other parts of Section 214. And, even aside from that, the *intent* of certain members of Congress – or even of every member of Congress who voted for the legislation – does not make legislation an unconstitutional infringement on Executive power. No matter what the intent, only an actual conflict can make legislation unconstitutional, and here there is none.

The bottom line, therefore, is that this Court need not decide the thorny constitutional issue of whether the Executive's "recognition power" is exclusive. Whether the Executive's "recognition power" is exclusive or not, Section 214(d) simply does not conflict with it. Accordingly, there is no basis for the Court to take the extraordinary step of invalidating this act of Congress that has been duly enacted into law based on a non-existent conflict.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed with instructions to enter judgment for Petitioner.

Respectfully submitted,

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July 22, 2014

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-628

Supreme Court, U.S.
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In The
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, Secretary of State,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW AND PROFESSORS OF FOREIGN RELATIONS AND CONSTITUTIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether acknowledging that Jerusalem is a "place" in Israel implicates or infringes a Presidential power to recognize foreign sovereigns.

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INTERESTS OF *AMICI CURIAE*[1]

The Louis D. Brandeis Center for Human Rights Under Law ("LDB") is a non-profit organization dedicated to advancing the civil and human rights of the Jewish people, and promoting justice for all. LDB is concerned that the discussion of matters pertaining to Israel often invokes double-standards and unduly tortured logic that would uniquely disfavor the Jewish national homeland, and thus negatively impact the status and personal security of Jews the world over.

Amici law professors have devoted significant time to the study, research, and teaching of the law of foreign relations and constitutional law. These academics are:

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or counsel made a monetary contribution to the brief's preparation or submission.

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Amici submit that this case lends itself to a much simpler resolution than would a true dispute between the President and Congress regarding the powers to

recognize the legal status of states and foreign sovereigns. The dispute over Jerusalem's legal status is but one of many territorial disputes posing challenges for American foreign policy. While the political branches may disagree about the extent to which either might exercise the power of *legal* recognition, it cannot seriously be questioned that Congress's authority to acknowledge, process and relate to simple facts regarding foreign territory – disputed or not – is a function necessary and proper to the exercise of its assigned powers. The constitutional avoidance doctrine calls for straightforward application of these established legal norms and accordingly, for reversal.

SUMMARY OF ARGUMENT

This Court does not lightly overturn acts of Congress. Nor does it rush to resolve difficult constitutional questions absent true necessity. These overarching principles counsel a more cautious approach than that undertaken by the court below, beginning with a proper understanding of what, exactly, Congress has done – and not done – in acknowledging that Jerusalem may be a "place" in Israel.

The lower court declined this Court's specific instructions to first consider "the nature of the statute," *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012), and instead worked backward from its assumed conclusion that the challenged statute sounds in legal recognition of a type implicating the Executive. The lower court's approach and conclusion were both erroneous.

"Recognition" in the foreign relations context refers to either of two acts: "state recognition," recognition that a given entity has the attributes of statehood and should thus be treated as a sovereign state; or "government" or "formal recognition," recognition of a given state's particular regime. The former may include accepting the validity of a sovereign's territorial claims – but it does *not* include simple "recognition" of a territory's factual circumstances. As Petitioner and other *amici* demonstrate, Congress and the President may each play roles in these two forms of *de jure* recognition, and their precise interaction is plainly a difficult constitutional question. That difficulty suffices to compel a decision on other grounds, if possible.

Fortunately, constitutional avoidance is possible, and thus warranted, upon examining "the nature of the statute." *Id.* at 1430; cf. *Bond* v. *United States*, 134 S. Ct. 2077 (2014). The President clearly cannot override Congress's ability to identify and relate to a state or territory's *de facto* status, the present on-the-ground reality of who governs a particular patch of land, if Congress is to exercise its powers over immigration, nationality, foreign commerce, and war. And plainly, that is all that Congress has done by enacting Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002) ("Section 214(d)" or "the Act").

As the United States indisputably recognizes both the sovereign State of Israel, and its (Jerusalem based) government, the question here is not about

either kind of "recognition," but rather about mere acknowledgment of Jerusalem's location.

Allowing for the fact that Jerusalem is a "place" in Israel is not only a necessary and proper exercise of Congress's enumerated powers. It is a routine act. For example, other statutes treat the West Bank (which includes parts of Jerusalem) as "Israel" for purposes of foreign trade; the constitutionality of such action has never been questioned.

Moreover, the determination of Jerusalem's location for the purpose of exercising Congress's enumerated powers is a legislative fact of the sort to which courts must ordinarily defer, if it is not a matter within judicial notice. Indeed, the Executive Branch officially acknowledges Jerusalem's location in Israel, reciting this fact in ways vastly more prominent than Congress's simple administrative decision. Congress has done no more, and far less, than has the Executive Branch, in recognizing Jerusalem's current status.

ARGUMENT

I. The Court of Appeals Did Not Heed Established Doctrine, Reflected in This Court's Specific Instruction to Consider Narrow Constructions Avoiding Constitutional Difficulty.

"[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

Jones v. *United States*, 529 U.S. 848, 857 (2000) (quotation omitted). Rejecting calls to resolve a serious constitutional dispute between the political branches with respect to the treaty power, this Court recently reiterated that "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond*, 134 S. Ct. at 2087 (quoting *Escambia Cnty.* v. *McMillan*, 466 U.S. 48, 51 (1984) (per curiam) and citing *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); see also *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 206 (2009). "[T]he fact that one among alternative constructions involves serious constitutional difficulties is reason to reject that interpretation in favor of [another]." Norman J. Singer, 2A Sutherland on Statutory Construction § 45.11, at 87 (7th ed. 2008) (collecting cases).

The constitutional avoidance doctrine has higher salience where plowing into the constitutional difficulty might risk invalidating an act of Congress. "The question is not whether" an alternative statutory interpretation "is the most natural interpretation of the [law], but only whether it is a 'fairly possible' one. As we have explained, 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2594 (2012) (Roberts, C.J.) (citations omitted).

This Court's instructions to the lower court asking it to decide the case did not bar application of

these familiar doctrines. To the contrary, this Court signaled that constitutional difficulty might be avoided by instructing:

> Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding *the nature of the statute and* of the passport and recognition powers.

Zivotofsky, 132 S. Ct. at 1430 (emphasis added). Yet in turning away Petitioner's constitutional avoidance approach, the lower court read this Court's instructions as:

> the Supreme Court has specifically instructed us to examine "the textual, structural, and historical evidence . regarding the nature . . . of the passport and recognition powers."

Pet. App. 13a (quoting *Zivotofsky*, 132 S. Ct. at 1430); see also *id.* 16a (same).

Having skipped over this Court's sensible mandate to first consider "the nature of the statute," the lower court apparently assumed, without truly examining, that the Act sounds in legal recognition. It offered that to decide that the Act does not implicate "the *President's* constitutional recognition power," *id.* 13a (emphasis added) – another assumption – "*is* a constitutional holding," *id.* And, as far as the lower court was concerned, the constitutional avoidance doctrine has no bearing where the choice lies between making two constitutional decisions.

Thus, the lower court capped its first two errors – prejudging that the recognition power is "the President's,"

and failing to heed this Court's instruction to examine "the nature of the statute" – with a third error: fundamentally misconstruing the constitutional avoidance doctrine. The doctrine is not limited to instances where courts must choose between deciding a difficult constitutional issue, and avoiding the Constitution altogether. Indeed, among the constitutional avoidance doctrine's manifestations is the rule that "[t]he Court will not formulate a rule of constitutional law broader than is *required* by the precise facts to which it is to be applied." *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) (emphasis added) (quotation and citation omitted).

Thus, in *Bond*, this Court avoided a difficult constitutional question by looking to established constitutional doctrine – "principles of federalism inherent in our constitutional structure." *Bond*, 134 S. Ct. at 2088. "[I]t is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 2090. Applying those established constitutional principles, this Court cabined the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229 *et seq.*, within Congress's constitutional limitation.

Nothing immunizes the recognition power, with all its attendant difficulties, from the constitutional avoidance doctrine. Suppose that the President, concerned that Israel might infer a negative statement regarding Jerusalem's status, refused to implement an act of Congress naming a post office after Saladin, Jerusalem's 1187 Arab conqueror. In a proper challenge to the President's resistance, courts would hopefully

avoid the recognition power dispute by "examin[ing] . . . the nature of the statute," *Zivotofsky*, 132 S. Ct. at 1430, and upon locating it exclusively within the postal power, U.S. Const. art. I, § 8, cl. 7, compel the President's performance of the ministerial act Congress mandated.

Whether the recognition power is solely "the President's," Pet. App. 13a, or shared to some extent with Congress, is plainly a vexing constitutional issue of first impression. The Framers' apparent silence on the issue and the dearth of evidence as to the power's original understanding only exacerbate the difficulty. See Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801 (2011).

The possibility that the recognition power might, to some extent, involve both political branches, strengthens the need to carefully examine the Act's nature. "Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond*, 134 S. Ct. at 2088 (citation omitted). Just as it may be "appropriate to apply the background assumption that Congress normally preserves the constitutional balance between the National Government and the States," *id.* at 2091 (quotation omitted), so, too should courts consider that Congress acts carefully in respecting the separation of powers.

With respect to the recognition power dispute, *amici* would offer that Petitioner has the better of the argument. Pet. Br. 27-57. But upon examining the

Act's nature, in light of the recognition power's limits and Congress's exclusive powers, it appears that this case does not call upon the Court to enter this particular constitutional thicket. And "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

II. The Recognition Power Does Not Inherently Include the Recognition Of National Borders.

In both U.S. constitutional practice and international law, recognition has two aspects. One is the "Recognition or Acceptance of States" ("state recognition"), whereby nations "treat as a state an entity meeting the requirements of [statehood]." Restatement (Third) of the Foreign Relations Law of the U.S. § 202(1) (1987) ("Restatement"). The second, distinct kind of recognition is the "Recognition and Acceptance of Governments" ("formal recognition"), *id.* § 203, whereby states recognize which authority officially represents a sovereign entity. Cf. 7 Foreign Affairs Manual 1300 *et seq*. App'x D (Nov. 2010) ("7 F.A.M.") at 1340(a) (distinguishing "what country now has sovereignty" from "whether that sovereignty is recognized by the United States").[2]

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[2] See also, *e.g.*, 22 U.S.C. § 611(e) ("The term 'government of a foreign country' . . shall include any faction or body of insurgents within a country assuming to exercise governmental

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The recognition of a State can, but need not, go along with a recognition of its government. However, the recognition of a government necessarily implies the recognition of a state, as when diplomatic relations are established with the government of a newly established country.

Recognition of the existence of a sovereign state and recognition of a particular regime exhaust the meanings of recognition in foreign relations and international law. There is no such thing as "geographic" recognition. Recognition of both nations and governments does not entail a delineation of their borders; nor does it presume an acceptance of their maximum claimed borders. Territorial issues only come into play in state recognition when one state conquers territory of another, or claims to secede from another. See Restatement § 202 at cmt. e & Reporter's Note 5; *id.* § 203, Reporter's Note 3.

Judge Tatel's concurrence below stated that "the power to recognize a sovereign state's territorial boundaries is a necessary corollary to the power to recognize a sovereign in the first place." Pet. App. 56a. By this theory, recognizing a newly independent state "necessarily entails a boundary determination." *Id.* These observations are entirely inconsistent with international law and U.S. practice. Recognizing a new state is an action entirely neutral as to boundaries.[3]

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authority whether such faction or body of insurgents has or has not been recognized by the United States.").

[3] See Restatement § 201, Reporters Note 1 ("The requirement of a defined territory does not deny statehood to entities

(Continued on following page)

Indeed, many new states are born with significant boundary disputes, *e.g.*, India/Pakistan; South Sudan/Sudan; Ethiopia/Eritrea. Recognizing their sovereignty is never regarded as taking a position on those disputes, which is an entirely separate matter from recognition.[4] Indeed, the U.N. Security Council routinely admits members with overlapping territorial claims, and in at least one case, entirely overlapping claims. See U.N. Doc. S/RES/702 (Aug. 6, 1991) (admitting as member states the Democratic People's Republic of Korea ("North Korea") and the Republic of Korea ("South Korea"), both of which claim as their territory the entire Korean peninsula).

All of the Court's references to the President's important role in recognition have been made in the context of state recognition – acknowledging an entity's status as a state, or government recognition – formal recognition of a government's legitimacy. Indeed, to the extent that a Presidential recognition power is deduced from the "Ambassadors" Clause, U.S. Const. art. II, § 3, cl. 3, this clearly only includes the two forms of recognition, both of which can be affected by establishing diplomatic relations. However, receiving ambassadors does nothing to establish geographic facts.

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that at their creation were involved in substantial controversies about their boundaries – *e.g.*, Israel in 1948; Kuwait in 1963; Estonia, Latvia, and Albania, in 1919") (citation omitted).

[4] See *The World Factbook: Disputes – International*, Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html (last visited July 21, 2014).

The Court has noted that the executive branch can "in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country." *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). That is, the President may take a position as "[t]o what sovereignty any island or country belongs" in the legal sense, "whether the [asserted] jurisdiction is rightful." *Id.* And at least absent disagreement or other input from the Congress, as was the case in *Williams*, that decision is "obligatory on the people and government of the Union." *Id.*

But nothing in that opinion suggests such an "assumption" would be binding on Congress in the exercise of *its* enumerated powers.[5] It certainly does not mean that the President enjoys a broader, unilateral and quite novel "geographic" recognition power to deny or reimagine the facts, just or unjust, of national borders. Indeed, the President's "assumption" of the Argentine claim's invalidity contrasted with the facts of the islands' administration and control. The case concerned an insurance claim for the seizure of ships that had defied the Falklands' then-existing Argentine authorities.[6]

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[5] Notably, in *Williams*, the Court deferred to the President's policy on *which* of two recognized countries has jurisdiction over a territory, given a dispute between the two. That is a far cry from binding Congress with a determination that a particular place, while apparently located in a given country, is in fact not, absent any dispute between two recognized sovereigns.

[6] An American captain thereafter arrived to "disarm the island, loot the settlements[,] arrest some of the inhabitants [and]

(Continued on following page)

As discussed *infra*, a Presidential "geographic" power would defeat Congress's exclusive authority in critical areas.

III. Congress Must Make Assumptions About Geographical Locations in Exercising Its Exclusive Powers Over Immigration, Nationality, Foreign Commerce, and War, and It Does So Without Regard to, or Impact Upon, Recognition.

The Constitution assigns to Congress, not the President, the powers "[t]o regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3; "[t]o establish an uniform law of Naturalization," *id.* § 8, cl. 4; "[t]o declare War," *id*, § 8, cl. 11; and to regulate "[im]migration," *id.* § 9.[7]

> "[A] government, entrusted with such powers must also be entrusted with ample means for their execution." Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful"

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declare[] the island government at an end." Harold F. Peterson, Argentina and the United States 1810-1960 at 106 (1964) (emphasis added).

[7] In barring Congress from limiting the "migration" of slaves prior to 1808, Article I, Section 9 is understood to reference a power to regulate immigration generally. *Smith* v. *Turner*, 48 U.S. (7 How.) 283, 454 (1849) (McKinley, J., concurring); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 216-17 (1824) (Marshall, C.J.).

> or "conducive" to the authority's "beneficial exercise."

United States v. *Comstock*, 560 U.S. 126, 133-34 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 408, 413, 418 (1819)) (other citation omitted).

In the course of exercising these powers, Congress must be able to acknowledge the reality of administration and control over foreign territory regardless of disputes concerning the legitimacy of such control. Nor could Congress effectively exercise these powers were they subject to presidential nullification for referencing territory that the President wishes to exclude from the scope of the legislative action.

Accordingly, Congress has long addressed its powers to disputed territories or unrecognized states. For example, Congress has occasionally set immigration quotas by country, see, *e.g.*, Emergency Quota Act, Pub. L. No. 67-5, § 2, 42 Stat. 5, 6 (1921); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400, 401 (1953), but explained that "[t]he provision of an immigration quota for a quota area shall not constitute recognition by the United States of the political transfer of territory from one country to another, or recognition of a government not recognized by the United States." Immigration and Nationality Act, Pub. L. No. 82-414, § 204(d), 66 Stat. 163, 178 (1952). Were Congress to authorize a separate immigration quota for Abkhazia and South Ossetia, the President would be compelled to admit immigrants from these disputed states notwithstanding his refusal to recognize these breakaway states and their governments.

Congress likewise accounts for unrecognized states and their unrecognized officials in the context of federal criminal law. In criminalizing misconduct relating to other countries, such as the counterfeiting of bills, notes, and bonds, 18 U.S.C. § 478; smuggling, *id.* § 546; and espionage, *id.* §§ 792-798; a "foreign government" includes "any government, faction, or body of insurgents within a country with which the United States is at peace, *irrespective of recognition by the United States*," *id.* § 11 (emphasis added). Likewise, assault, *id.* § 112; extortion, *id.* § 878; property destruction, *id.* § 970; murder, *id.* § 1116; and kidnapping, *id.* § 1201; are federal crimes when directed at foreign officials, even when the validity of the victim-official's government is itself not recognized, *id.* § 1116(b)(2); see also preceding sections (incorporating same).

Were the President to find it expedient, for reasons of foreign policy, to look the other way as unrecognized governments have their money counterfeited and their officials killed, he would retain only the ordinary power of prosecutorial discretion. Under federal law, those actions would remain criminal.

Congress can also declare or authorize war on a nation without recognizing its existence as a sovereign. Thus the Gulf of Tonkin resolution explicitly responded to the aggression of the "Communist Regime in Vietnam," Pub. L. No. 88-408, 78 Stat. 384 (1964), though the U.S. did not recognize said regime.

Precedent confirms that Congress must be able to direct its war powers against unrecognized entities. Long ago, this Court held that the Neutrality Act of 1794, Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, which forbade only the aiding of "any foreign prince or state," did not reach aiding unrecognized belligerents. *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246, 323-25 (1818). Congress thereafter amended the Act to cover hostile actions on behalf of or against not only states, but "any colony, district, or people." Act of Apr. 20, 1818, ch. 88, § 3, 3 Stat. 447; see *The Lucy H.*, 235 F. 610 (N.D. Fla. 1916). It would hardly make a difference if Congress, instead of enacting a general neutrality law, actually named the "districts or peoples" to whom it would be forbidden to render assistance, yet naming such unrecognized entities would not violate any recognition power.

The Government's theory not only clouds the Neutrality Act; it would bar Congress from declaring war on North Korea because the United States does not recognize it as a state. Moreover, if Congress were to declare war on North Korea, the President's theory of this case could sanction his bombing of South Korea, and even China, Mexico, or Jerusalem (which, if it is not in Israel, may after all be in North Korea), as exclusive "decider" of what territory comprised the enemy nation.

Congress can also direct the expenditure of money in overseas places, regardless of their recognition status. For example, U.S. policy as formulated by both political branches has long held that Western

Sahara, invaded by Morocco in 1975, is not part of sovereign Moroccan territory, despite Morocco's exercising control over the territory. Nonetheless, in the 2014 Omnibus Budget Act, Congress provided that foreign aid to Morocco can also be spent in the Western Saharan territory it controls. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7041(h), 128 Stat. 5, 526 (2014). Congress did not designate aid to Western Sahara as a separate item of foreign aid, but rather specifically entered it as a specification of where foreign aid to Morocco could be spent. Movement in this direction began in 2012, when the conference report accompanying the spending bill provided that "funds provided . . . for Morocco may be used in regions and territories administered by Morocco." H.R. Rep. No. 112-331, at 1332 (2011) (Conf. Rep.).

Crucially, before the 2014 measure, the Executive restricted Moroccan foreign aid to Morocco proper to avoid recognizing its sovereignty over Western Sahara. Alexis Arieff, Cong. Research Serv., RS21579, Morocco: Current Issues (2013). Nonetheless, Congress's action was entirely uncontroversial because it was made pursuant to a legitimate exercise of its enumerated powers. The spending measure merely constitutes a *de facto* acknowledgment of Moroccan control of the region in which Congress wishes to exercise its spending power. See H.R. Rep. No. 113-185 at 73 (2013) (describing Western Sahara as "territories administered by Morocco").

Congress's regulation of commerce with states or territories is not impacted by the latter's recognition status. As Petitioner recounts, in 1800 and again in 1806, Congress alternately authorized and prohibited trade with authorities on disputed Hispaniola. Pet. Br. 37-40. In the Government's view, the President would be able to exercise broad foreign trade powers, akin to a line item veto. Cf. *Clinton* v. *City of New York*, 524 U.S. 417 (1998).

Imagine if Congress passed a free trade regime with Ruritania, to the consternation of U.S. widget manufacturers distressed by the new competition from Ruritania's powerful widget industry. Under the government's theory, a president could effectively rewrite the free trade law by refusing to "recognize" the widget-producing area as part of Ruritania. At the behest of domestic vintners, the President could refuse to list Bordeaux as a part of France, and instead apply to the region's wines the higher tariff assigned to another nation. The President could target products from any disputed territory, *e.g.*, Falklands wool or Gibraltar fish. The prospect for mischief is endless.

Of particular relevance, Congress has extended trade agreements with Israel to cover the areas that came under Israeli jurisdiction in 1967. While U.S. policy clearly does not treat these as part of Israeli sovereign territory, Congress nonetheless has allowed the extension of the special free trade benefits enjoyed by Israel to the territories under its control. See United States-Israel Free Trade Area Implementation

Act ("FTAIA"), Pub. L. No. 99-47, 99 Stat. 82 (1985), *as amended by* Pub. L. No. 104-234, § 1, 110 Stat. 3058 (1996). Under both the original act and its 1996 amendment,[8] goods from the West Bank and Gaza can be treated as goods of Israel for purposes of the free trade agreement.[9]

This means, inter alia, that goods originating in the West Bank or Gaza can be labeled "Made in Israel," and receive Israel-designated tariff treatment in the United States. *Id.* Articles can be treated "as if they were shipped directly from Israel" for trade law purposes even "if shipped to the United States from the West Bank [or] Gaza."[10] Notably, no separate provision is made for goods originating in Jerusalem – and the "West Bank" includes much of Jerusalem's municipal boundaries.

It also bears noting that in passing the law, the Senate Report noted that the measure's objectives include some distinctly foreign policy oriented ones, such as "promoting the peace process in the Middle

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[8] The 1996 Amendment was designed to allow for the continuation, after the creation of the Palestinian Authority, the practice where, for purposes of the FTAIA, "products of the West Bank and the Gaza Strip were marked as products of Israel." See Sen. Rep. No. 104-270, at 2 (1996), Report to Accompany H.R. 3074, May 13, 1996, Par. II.A.

[9] See Harmonized Tariff Schedule of the United States, at 22 General n. 8(b) (2014), available at http://www.usitc.gov/publications/docs/tata/hts/bychapter/1401gn.pdf#page=22 (last visited July 21, 2014).

[10] Proclamation No. 6955, 61 Fed. Reg. 58761 (Nov. 13, 1996).

East" and "ending the Arab economic boycott of Israel." See Sen. Rep. 104-270, at 3 (1996). Of course, the American response to the Arab secondary boycott of Israel might profoundly impact international relations, but the President is expected to enforce, not resist, Congress's policy in this area. See 26 U.S.C. § 999; 50 U.S.C. app. § 2407.

If Congress can designate the West Bank as *de facto* assimilated to Israel in the exercise of its Tariff and Foreign Commerce powers, there is no reason it should not be able to do the same with Jerusalem (a geographically partially overlapping designation) under its Immigration and Nationality powers.

Adopting the Government's view in this case would, far from avoiding unnecessary constitutional questions, cast substantial doubt on the validity of important existing trade agreements, spending measures and other legislation whose constitutionality has previously never been questioned. It would also mean that the President can in effect expand or narrow duly enacted laws about naturalization, war, foreign trade and tariffs, foreign aid, and more, simply by making arbitrary and unreviewable determinations about "where" particular places are. Such vast powers should not be lightly inferred given the lack of any precedent for an exclusive presidential "geographic" authority.

IV. Section 214(d) Reflects Congressional Acknowledgment of Jerusalem's *de facto* Status as a City in Israel. The Act Mirrors the Official Executive Determination on the Subject, Implying No Legal Recognition But Warranting Substantial Deference.

There is no point belaboring here the history of Congress's pervasive regulation of passports, a matter well and thoroughly presented by Petitioner and other *amici*, upon which this Court has previously reflected in some detail. See *Kent* v. *Dulles*, 357 U.S. 116 (1958). A passport is a "travel control document," *Haig* v. *Agee*, 453 U.S. 280, 293 (1981), that, whatever its origins, "today" serves the "crucial function [of] control over exit," *Kent*, 357 U.S. at 129. The issuance and regulation of passports plainly constitutes a necessary and proper exercise of Congress's exclusive powers over immigration, nationality, foreign commerce, and war.

The same holds true for a passport's reference to a "place of birth." "As a general rule, the country that currently has sovereignty over the place of birth is listed as the place of birth." 7 F.A.M. 1330(b) App'x D. This Court has recognized that the term "country" "may describe a foreign State in the international sense," but might also "embrace all the territory subject to a foreign sovereign power." *Burnet* v. *Chi. Portrait Co.*, 285 U.S. 1, 5-6 (1932). "[T]he commonsense meaning of the term [country]" is not coextensive with "sovereign state." *Smith* v. *United States*,

507 U.S. 197, 201 (1993). Accordingly, "the ordinary meaning of the language itself ["country"], we think, includes Antarctica, even though it has no recognized government." *Id.*

"[T]he sense in which ['foreign country'] is used in a statute must be determined by reference to the purpose of the particular legislation." *Burnet*, 285 U.S. at 6 (footnote omitted). This case thus potentially turns on the question: in what sense do passports list the citizen's place of birth? If such listings express statements of legal recognition, the Court would be confronted with questions about the extent to which either branch recognizes foreign countries or their governments. But if such listings are merely administrative, Section 214(d) is nothing more than a routine Congressional reference to a fact about our world, and well within Congress's exclusive power to direct.

The question is not difficult. As the State Department itself acknowledges, "[t]hat [place of birth] entry is included to assist in identifying the individual." 7 F.A.M. 1310(g)(2) App'x D.

> The "place of birth" designation is an integral part of establishing an individual's identity. It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin

> or other person designated by the individual to be notified in case of an emergency.

Id. at 1310(g) App'x D. Accordingly, "the United States will not issue a U.S. passport with no place of birth listing." *Id.*

The State Department advises anyone who persists in complaining about the passport's inclusion of a "place of birth" that "[o]ver the last few years, deletion of the place of birth entry from the U.S. passport has been discussed extensively among U.S. Government agencies and with the Congress." *Id.* at 1310(g)(4) App'x D. "In 1986, Congress directed the Comptroller General to complete a study on the issue." *Id.* at 1310(g)(4)(a) App'x D. The GAO reviewed "two separate studies," which "concluded that elimination of the place of birth from the U.S. passport would cause considerable inconvenience to the entire traveling population." *Id.* at 1310(g)(4)(b) & (c) App'x D. Law enforcement chimed in, claiming that the "place of birth" entry "is a vital data element used in anti-terrorist, anti-drug, and anti-fraud programs." *Id.* at 1310(g)(4)(d) App'x D. Accordingly,

> The GAO report reinforced previous conclusions that removal of the place of birth would lead to serious problems for the U.S. Government and for the majority of the American traveling public.

Id. at 1310(g)(4)(e) App'x D.

Because the "place of birth" entry sounds wholly in administration, and not in recognition, American

passports bear "places of birth" that would not appear on any list of states or governments recognized by the United States, including Taiwan, *id.* at 1340(d)(6) App'x D, "West Bank," "Gaza Strip," and "Palestine," *id.* at 1360 App'x D, the last three of which have never been recognized as countries by the United States, nor existed as such.

It is strange indeed that the President would use litigation over Petitioner's passport as a forum in which to express views regarding Jerusalem's legal status. An American passport bearing "Israel" as a traveler's "place of birth" tells foreign passport inspectors nothing about a citizen's connection to Jerusalem, other than that the passport holder likely holds the citizenship of a country designating Jerusalem as its capital. As regards American foreign policy, it does not necessarily confirm the fact that the United States affords Israel state recognition – something many Arab nations do not, to the point of barring entry to anyone whose passport evinces past travel to Israel (never mind birth there).

But if the President is concerned about some foreign passport official taking offense at acknowledgment that Jerusalem is presently within Israel, he should hope that official does not, in his time away from examining passports, visit the Central Intelligence Agency's "World Factbook" webpage for Israel.[11]

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[11] *The World Factbook: Israel*, Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/is.html (last visited July 21, 2014).

Among Israel's "major urban areas – population:" the CIA lists "JERUSALEM (capital) 791,000 (2009)." *Id.* The CIA gives Israel's population as 7,821,850, *id.* – a figure which must include at least some and most likely all Jerusalem residents.[12]

In other words, the CIA presents on its website that Israelis living in the West Jerusalem neighborhood of Petitioner's birth are among Israel's total population, and within Israel's capital. Of course, the CIA *World Factbook* would not be very useful were its "facts" bent to suit disputed legal constructs such as sovereign jurisdiction.

The CIA's "Jerusalem in Israel" position is not accidental. As a matter of geography, it reflects *the official position of the Executive Branch.* Because the proper functioning of government requires the establishment of basic facts about places, there exists within the Executive Branch a Board of Geographic Names ("BGN"). See 43 U.S.C. §§ 364-364f.

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[12] While it is unclear from where the CIA derives its data, Jerusalem's 2011 population stood at 801,000. See *Selected Data on the Occasion of Jerusalem Day*, May 16, 2012, Central Bureau of Statistics (Israel), available at www1.cbs.gov.il/www/hodaot2012n/11_12_126e.pdf (last visited July 21, 2014). That same year, Israel's population totaled 7,836,600. See *Statistical Abstract of Israel 2013*, No. 64, Subject 2, Table 1, Central Bureau of Statistics (Israel), available at http://www.cbs.gov.il/reader/shnaton/templ_shnaton_e.html?num_tab=st02_01&CYear=2013 (last visited July 21, 2014). Per these figures, Jerusalem contains approximately 10% of Israel's population – the same proportion found in the CIA's quite similar population numbers.

In conjunction with the Interior Secretary, the BGN "shall provide for uniformity in geographic nomenclature and orthography throughout the Federal Government." *Id.* § 364. The BGN's membership includes, inter alia, representatives of the State, Defense, and Homeland Security Departments, as well as the Central Intelligence Agency.[13]

The National Geospatial Intelligence Agency's ("NGA") GEOnet Names Server database "is the official repository of foreign place-name decisions approved by the U.S. Board on Geographic Names." *Foreign Names*, U.S. Bd. on Geographic Names, http://geonames.usgs.gov/foreign/index.html (last visited July 21, 2014). The NGA advises that

> [t]he geographic names in [its] database are provided for the guidance of and use by the Federal Government and for the information of the general public. **The names, variants, and associated data may not reflect the views of the United States Government on the sovereignty over geographic features.**

See GEOnet Names Server, National Geospatial Intelligence Agency, http://geonames.nga.mil/namesgaz/ (last visited July 21, 2014).

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[13] 43 U.S.C. § 364a; *Getting the Facts Straight*, U.S. Bd. on Geographic Names, available at http://geonames.usgs.gov/brochures_factsheets/docs/USBGN%20Getting%20the%20Facts%20Straight.pdf (last visited July 21, 2014).

Searching that database reveals a variety of Jerusalems – including one in "Israel," bearing a "conventional" name designation[14] and the Unique Name Identifier 13535646. A city in "Israel" under the Hebrew transliteration, "Yerushalayim," is also BGN-approved, Unique Name Identifier 13535647.

If these names are "provided for the guidance of and use by the Federal Government" – by an executive agency – the Executive can hardly complain when Congress takes such "guidance" and makes "use" of the "names" in the context of locating and uniquely identifying geographic features. That Congress might also have communicated a position on that geographic feature's legal status is irrelevant; Congress, like the President, cannot be required to choose between relating to geographic features, and expressing opinions about them.

Congress is entitled to follow the BGN's conclusion about Jerusalem's status as it regulates identifying information on passports. After all, Israel does exercise exclusive jurisdiction and control over the city, which it formally annexed long ago. Whatever the legal validity of Congress's earlier recognition of

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[14] "A commonly used English-language name approved by the U.S. Board on Geographic Names (BGN) for use in addition to, or in lieu of, a BGN-approved local official name or names, e.g., Rome, Alps, Danube River." This definition appears when selecting "Name Type Codes" under "Lookup Tables," at http://geonames.nga.mil/namesgaz/, and selecting "Search Name Type Codes."

Jerusalem as Israel's capital, the truth of at least some of the facts Congress found in the course of so doing is incontestible, *e.g.*, that "[t]he city of Jerusalem is the seat of Israel's President, Parliament, and Supreme Court, and the site of numerous government ministries and social and cultural institutions;" and that "[s]ince 1967, Jerusalem has been a united city administered by Israel." Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 2, 109 Stat. 398 (1995).

For this Court to reject Congress's determination in enacting Section 214(d), it would have to accept that "Congress has no reasonable basis for believing that" Jerusalem is within Israel. *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). Congress is "of course entitled to a great deal of deference" when engaging in fact-finding. *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (citations omitted). Determining that Jerusalem is, in fact, in Israel, is far from the most controversial factual findings that courts have accepted. See, *e.g.*, *Nix* v. *Hedden*, 149 U.S. 304 (1893) (finding that tomatoes, which are botanically fruit, are vegetables).

Indeed, Jerusalem's location in Israel is the sort of simple fact of which courts properly take judicial notice. See *Gov't of Canal Zone* v. *Burjan*, 596 F.2d 690, 693 (5th Cir. 1979) (courts "may take judicial notice of governmental boundaries") (judicially noticing boundary between Panama and Canal Zone); *Philipps* v. *Talty*, 555 F. Supp. 2d 265, 267 n.2 (D.N.H. 2008) (judicially noticing St. Martin's political division and legal system). Doing so is sometimes necessary to

decide cases, and serves as no commentary on the legitimacy of borders or governments.

Other nations might take offense at American passports for all sorts of reasons. But such offense cannot constrain the administration of laws Congress duly enacted pursuant to its assigned powers. The President could not, for example, refuse to implement Congressional codification of the current passport design, bowing to pressure from regimes offended by what they might consider to be graven images in the depictions of Mount Rushmore, see United States Passport (28 page version, 2014) at 14-15, and the Statue of Liberty, *id.* at 26-27.

Enmity among nations cannot supply the President with the power to intrude upon and nullify Congress's necessary and proper exercise of its powers. Congress has the power to identify "Israel" and its declared capital, Jerusalem, on the map, even if such actions are forbidden elsewhere.

CONCLUSION

There is no "Israel exception" to Congress's powers over immigration, nationality, foreign commerce, and war. Congress cannot exercise these powers without inherently determining basic facts about the physical location of various places around the world, including areas that are the subject of vexing territorial disputes. Whatever role the President enjoys in recognizing foreign sovereigns, and quite apart from the

question of Jerusalem's current or future legal status, the President cannot set aside Congress's considered determination that Jerusalem is, as a matter of fact, presently a "place" in Israel.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,
Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Congress routinely delegates limited administrative authority to the Secretary of State when exercising its law-making powers. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002), directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as "Israel" on a consular report of birth abroad and on a United States passport.

The question presented is whether Section 214(d) is unconstitutional on the grounds that the President's recognition power is not only exclusive, but also so broad as to authorize the Executive to disregard any duly enacted statute that the President determines, in his discretion, implicates recognition policy.

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INTEREST OF *AMICI CURIAE*

Amici curiae Members of the United States House of Representatives have a fundamental institutional interest in safeguarding Congress's foreign affairs and passport powers from Executive overreach. *Amici* also have a fundamental interest in defending the constitutionality of the statute at issue, which passed overwhelmingly in both Houses of Congress, and in seeing the directives of the Legislative Branch enforced in the courts. The names of individual *amici* are listed in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below invalidated an Act of Congress on constitutional grounds, and handed the President significant new foreign affairs powers at Congress's expense. It should be reversed.

"It is beyond dispute that Congress's immigration, foreign commerce, and naturalization powers authorize it to regulate passports" and consular reports of birth abroad. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 221 (D.C. Cir. 2013) (Tatel, J., concurring); *see also* Members of U.S. Senate and U.S. House of Representatives Amicus Brief 5–14, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) (discussing over 200 year history of con-

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

gressional legislation in the fields of passports and the status of U.S. citizens born abroad, and constitutional authority therefor).

Accordingly, if "the statute [at issue]," Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)—which permits "an American born in Jerusalem [to] choose to have Israel listed as his place of birth on his passport" and report of birth abroad, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012)—"does not trench on the President's powers, then the Secretary [of State] must be ordered to issue Zivotofsky a passport that complies with § 214(d)." *Id.*[2]

In determining whether Section 214(d) "trench[es] on the President's powers," this Court must determine both the scope of any exclusive Executive recognition power, and whether and to what degree, if any, the statute at issue prevents the President from exercising that power.

First, "[n]either the text of the Constitution nor originalist evidence provides much help in answering

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[2] *See also, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (executive officers "may not act contrary to the will of Congress when exercised within the bounds of the Constitution."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156–59 (1803) ("[It is] the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws."). Although the Executive claims some independent authority in the field of passports arising out of its foreign affairs powers, it nevertheless must comply with the statute at issue, so long as the statute does not impermissibly infringe any *exclusive* Executive power.

the question of the scope of the President's recognition power." *Zivotofsky*, 725 F.3d at 206. In such circumstances, the answer must be found in the structure of the Constitution and separation of powers principles. *See N.L.R.B. v. Noel Canning*, 573 U.S. ____, 189 L. Ed. 2d 538 (2014) (slip op. at 26, 40–41); *accord id.* at 3–5, 27 (Scalia, J., concurring in the judgment). These sources of constitutional authority make clear that the recognition power should be construed narrowly, so as not to undermine Congress's legislative authority, and its central role in foreign affairs under our constitutional framework. *See infra* pp. 5–19.

The Constitution grants to Congress a wide array of foreign affairs powers. *See infra* pp. 6–7. In fact, the implementation of foreign policy—including with respect to matters that implicate recognition—depends on Congress's exercise of these powers. *See infra* p. 7. Our constitutional framework contemplates not only cooperation between the branches of government in this arena, but also a measure of tension. Indeed, in its division of powers, the Constitution is "an invitation to struggle for the privilege of directing American foreign policy." Edward S. Corwin, *The President: Office and Powers, 1787–1984* 201 (Randall Bland et al. eds., 5th ed. 1984). Since the Founding, Congress and the President have been engaged in that fruitful and dynamic struggle. The zones of exclusivity for either branch have been drawn narrowly, including with respect to recognition. Congress has thus enacted numerous statutes that touch on, respond to, or register discord with the President's formal recognition policies. *See infra* pp. 8–13.

The view of the Executive that the exclusive recognition power stretches so far as to envelop any statute that relates to recognition is irreconcilable with this constitutional structure, and threatens to demote Congress from its intended role as the President's counterweight in foreign affairs to his minion. The recognition power cannot be drawn so broadly as to swallow completely, at the Executive's sole discretion, the exercise of Congress's law-making authority in the fields of immigration, naturalization, foreign commerce, passport control, criminal law, and foreign policy. *See infra* pp. 13–16. The Executive's position is also inconsistent with the purpose of the President's foreign affairs and recognition powers, incompatible with the settled practices of the political branches, and, as adopted by the court of appeals, represents an abrogation of the Judicial Branch's responsibility to independently review and evaluate the constitutional question presented here. *See infra* pp. 16–19.

Second, this Court reviews with suspicion expansive claims of exclusive Executive authority, where the Legislative Branch has acted in furtherance of its own broadly assigned powers. The Constitution does not "requir[e] three airtight departments of government," *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (internal quotation marks omitted), but instead "enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity," *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Thus, under this Court's separation of powers jurisprudence, Congress acts properly so long as its actions do not "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443; *infra* pp. 19–22.

Section 214(d) in no way prevents or significantly impedes the President from exercising the recognition power. It does not direct the President to alter U.S. recognition policy towards Jerusalem or to consider Jerusalem to be within the borders of Israel as a matter of U.S. foreign policy. It merely instructs the Secretary of State to perform the ministerial act of recording "Israel" as the place of birth on the passport and consular report of birth abroad of an individual who avails himself of the self-identification opportunity presented by the statute. *See infra* pp. 22–25. This is, at most, an example of the kind of "integrat[ion of] the dispersed powers into a workable government," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), that is both practically necessary and constitutionally appropriate in our Republic. It is, in fact, the *Executive's* expansive view of the recognition power—adopted by the court of appeals—that interferes with *Congress's* performance of its Article I duties, and upsets the Constitution's careful balance of powers in foreign affairs.

ARGUMENT

I. THE RECOGNITION POWER SHOULD BE CONSTRUED NARROWLY SO AS NOT TO TRENCH ON CONGRESS'S ROLE IN FOREIGN AFFAIRS UNDER OUR CONSTITUTIONAL FRAMEWORK.

The recognition power is the power to define, as a matter of official United States foreign policy, which political body or actor legitimately "speaks as the sovereign authority for the territory it purports to control," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), or "to what sovereignty" territory legitimately belongs, *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). Limiting the exclu-

sive Executive recognition power to this formal authority sustains the Constitution's system of checks and balances by enabling Congress to exercise levers of authority in the foreign affairs arena assigned to it, while leaving to the Executive the authority to decide the core question of formal recognition. The Executive's contrary position (adopted by the court of appeals)—that the exclusive recognition power envelops any legislation that touches, however tangentially, on recognition policy—usurps Congress's ability to appropriately exercise its Article I powers and threatens to transform Congress from its constitutionally assigned function as the Executive's counterweight in foreign affairs to his minion.

1. "Neither the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power." *Zivotofsky*, 725 F.3d at 206. In such circumstances, the answer "must be found in the nature of the government created by that instrument," *Downes v. Bidwell*, 182 U.S. 244, 249 (1901)—the "structure" of the Constitution, and separation of powers principles, *Noel Canning*, 573 U.S. ____ (slip op. at 26, 40–41); *accord id.* at 3–5, 27 (Scalia, J., concurring in the judgment).

Under our constitutional structure, authority over the "conduct of the foreign relations of our Government" is shared between "the Executive and Legislative—'the political'—Departments." *Medellin v. Texas*, 552 U.S. 491, 511 (2008) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)); *accord Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). The Constitution equips Congress with a plethora of foreign affairs powers—including the power to "regulate Commerce

with foreign Nations," "declare War," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "make Rules for the Government and Regulation of the land and naval Forces" (among other military powers), "grant Letters of Marque and Reprisal," and "establish an uniform Rule of Naturalization" (U.S. Const. art. I, § 8)—as well as general law-making and appropriations powers that necessarily implicate foreign policy (*id.* §§ 1, 9). The Constitution also gives Congress foreign affairs powers that it exercises in conjunction with the President, such as treaty-making (*id.* art. II, § 2). Thus, as a matter of constitutional structure and purpose, Congress is assigned a central role in the conduct of foreign affairs.

Indeed, the implementation of foreign policy *depends* on Congress's exercise of its appropriations, foreign trade, immigration, naturalization, and general law-making powers. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, §§ 1701-8006, 127 Stat. 198, 427-31 (allocating funds appropriated for the Department of State, Foreign Operations, and Related Programs); Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* 108–14 (2007) (discussing Executive's reliance on the Legislative Branch in the realm of foreign affairs due to the fact that "Congress, not the President, holds lawmaking and funding power"). This is so with respect to recognition policy as well.[3]

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[3] *See, e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864, 865–67 (supporting the U.S. recognition of the National League for Democracy by, *inter alia*, imposing trade and visa bans against Burma's military regime).

2. The Constitution contemplates not only cooperation between the branches in foreign affairs, but also a measure of tension. Indeed, in its sometimes oblique division of powers in this arena, the Constitution is "an invitation to struggle for the privilege of directing American foreign policy." Corwin, *supra*, at 201. Occasional friction between branches provides "'security . . . against a gradual concentration of the several powers in the same department,'" and is thus critical to our system of checks and balances. *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting The Federalist No. 51, at 349 (James Madison) (J. Cooke ed., 1961)).

Since the Founding, Congress and the President have been engaged in that fruitful and dynamic struggle. The zones of exclusivity in foreign affairs for either branch have been drawn narrowly. Congress has thus enacted numerous statutes that touch on, respond to, or register discord with the President's formal recognition policies.

For example, after President Carter recognized the People's Republic of China as the sovereign authority over Taiwan, Congress enacted the Taiwan Relations Act, which provides that non-recognition of Taiwan does "not affect the application of the laws of the [U.S.] with respect to Taiwan," and granted Taiwan many of the rights of recognized sovereigns, including the authority to sue and be sued, the right to own property in the United States, and the ability to obtain export licenses under nuclear non-proliferation and nuclear energy treaties. Pub. L. 96-8, 93 Stat. 14 (1979). Similarly, in advance of the transfer of sovereignty over Hong Kong from the United Kingdom to China, Congress passed the United States-Hong Kong Policy Act of 1992, which

provides that U.S. laws "shall continue to apply" to Hong Kong "[n]otwithstanding any change in . . . sovereignty," unless modified by law or executive order. Pub. L. No. 102-383, 106 Stat. 1448. Congress has also often issued resolutions directed at shaping recognition policy.[4]

Moreover, Congress regularly prohibits or conditions foreign assistance to particular countries, and in accordance with substantive requirements, that, given the Executive's expansive position on recognition, may now be viewed as intruding upon its recognition power. *See, e.g.*, Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 494, 500, 502, 509–11 [hereinafter Consolidated App. Act] (prohibiting financial assistance to the government of any country whose "duly elected head of government is deposed by military coup d'état," unless "the President determines and certifies to the Committees on Appropriations that . . . a democratically elected government has taken office"). Congress used these

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[4] Recent examples include the Syria Democracy Transition Act of 2012, S. 2152, 112th Cong. (2012) (calling for "the departure from power of [President] Bashar al-Assad"), and respective Senate and House of Representatives resolutions regarding Libya. *See* Calling for a No-fly Zone and the Recognition of the Transitional National Council in Libya, S. Res. 102, 112th Cong. (2011) (calling on the President to recognize Libya's Transitional National Council (TNC) "as the sole legitimate governing authority in Libya"); Expressing the Sense of the House of Representatives Regarding the Regime of Mu'ammar al-Qadhaffi, H.R. Res. 188, 112th Cong. (2011) (declaring "the sense of the House of Representatives" that the TNC "should be considered the legitimate representatives of the Libyan people and nation").

tools to frustrate President Reagan's support for the Contras by prohibiting the expenditure of funds "for the purpose of overthrowing the Government of Nicaragua," Joint Resolution of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865, and has similarly influenced foreign policy through such legislation since the Founding. *See* Ramsey, *supra*, at 112 (discussing President Washington's acquiescence to congressional defunding of certain diplomatic posts).

Particularly relevant here, Congress has conditioned funding in support of a Palestinian state, *see* Consolidated App. Act at 518, prohibited funding "to create in any part of Jerusalem a new office . . . of the United States Government for the purpose of conducting official United States Government business with the Palestinian Authority," *id.* at 519, conditioned assistance to the West Bank and Gaza, and to the Palestinian Authority, *id.* at 519–21, and prohibited the funding of any government controlled by, or sharing power with, Hamas, *id.* at 521–22. Congress also frequently conditions or restricts funding to particular governments and entities in response to *de facto* political developments in foreign countries.[5]

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[5] *See, e.g.*, Consolidated App. Act at 525 ("None of the funds appropriated by this Act may be made available for the Lebanese Armed Forces (LAF) if the LAF is controlled by a foreign terrorist organization."); *id.* ("None of the funds appropriated by this Act may be made available for assistance for the central Government of Libya unless the Secretary of State reports to the Committees on Appropriations that such government is cooperating with United States Government efforts to investigate and bring to justice those responsible for the attack on United States personnel and facilities in Benghazi.").

These restrictions are in force without regard for whether they are in congruence with or run contrary to the Executive's determinations regarding the legitimacy or recognition of these entities and governments.

3. In addition, Congress has enacted legislation in a variety of foreign affairs contexts that expressly governs both recognized and unrecognized sovereigns. For example, Congress has established immigration caps and guidelines by country that apply without regard for whether a region is recognized or not. *See, e.g.*, Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400, 402 (establishing quotas for visas issued to, *inter alia*, Palestinian refugees); Immigration and Nationality Act of 1952, Pub L. No. 82-414, § 202(d), 66 Stat. 163, 167, 168 [hereinafter INA] (representatives of foreign governments are not deemed "immigrants," whether or not the governments are "recognized de jure"); Immigration Act of 1924, Pub. L. No. 68-139, § 12, 43 Stat. 153, 161 (setting guidelines for treatment of immigrants from new countries and regions in which political boundaries have changed, even if change "has not been recognized" by the United States). At the same time, Congress has made clear that such legislation about a particular non-recognized sovereign "shall not constitute . . . recognition of a government not recognized by the United States." INA § 202(d).

And for the purposes of criminal law, Congress has for almost a century expressly defined "foreign government" to include "any Government, faction, or body of insurgents within a country with which the

United States is at peace," whether or not "recognized by the United States as a Government."[6] It continues to do so today, 18 U.S.C. § 11, in order to ensure that crimes relating to chemical weapons development and use (*id.* §§ 229, 229F(5)), counterfeiting (*id.* § 478), smuggling (*id.* § 546), and espionage (*id.* §§ 792–798), among many others, apply regardless of whether the foreign entity involved is formally recognized by the United States.[7]

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[6] An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce the Criminal Laws of the United States, and for Other Purposes, 1917, Pub. L. No. 65-24, 40 Stat. 217, 226. *See also, e.g.*, Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1306, 100 Stat. 853, 898 (requiring forfeiture of certain illicitly obtained property from any "foreign government whether recognized or unrecognized by the United States"); Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. 92-539, § 101, 86 Stat. 1070, 1071 (1972) (criminalizing the murder of an "officer of cabinet rank or above" of "the government of a foreign country, irrespective of recognition by the United States"); Crimes and Criminal Procedure Act, 1948, Pub. L. No. 80-772, §794, 62 Stat. 683, 737 (criminalizing the communication, with the intent to injure the United States, of material relating to the national defense of the United States to "any foreign government . . . whether recognized or unrecognized by the United States").

[7] Title 18 similarly criminalizes the assault (18 U.S.C. § 112), extortion (*id.* § 878), property destruction (*id.* § 970), murder (*id.* § 1116), and kidnapping (*id.* § 1201) of any foreign official, whether of a recognized government or not. *See id.* § 1116(b)(2) ("'Foreign government' means the government of a foreign country, irrespective of recognition by the United States.");

[Footnote continued on next page]

Legislative enactments of this type (including Section 214(d))—whether touching on, responding to, or in tension with formal recognition policy—are consistent with, and supported by, the Constitution's distribution of powers in foreign affairs and its overarching structure. Indeed, drawing the exclusive Executive recognition power narrowly sustains the Constitution's system of checks and balances by enabling Congress to exercise levers of authority in the foreign affairs arena assigned to it, while leaving to the Executive the authority to decide the core question of formal recognition.

4. The Executive nevertheless argues that any statute "the Executive believes . . . constitutes . . . an incident of recognition" is "within the scope of the Executive's power." Transcript of Oral Argument 33:5–25, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) [hereinafter Transcript of Oral Argument].[8] The court below adopted this view of the scope of the exclusive Executive recognition power, *Zivotofsky*, 725 F.3d at 213, 219 (holding that the Executive's recognition power "'includes the power to determine the

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id. §§ 112, 878, 970 (incorporating this definition of foreign government).

[8] Similarly, on remand, the Executive asserted that because the "State Department [] determined" that listing "Israel" as the place of birth on a passport "would be an official act of recognition," Section 214(d) is an "unconstitutional encroachment" on the President's authority to recognize foreign sovereigns. Brief for Appellee 50, 52, *Zivotofsky v. Sec'y of State*, 725 F.3d 197 (D.C. Cir. 2013) (No. 07-5347) (internal quotation marks omitted).

policy which is to govern the question of recognition'") (quoting *United States v. Pink*, 315 U.S. 203, 229 (1942)), and it has not been disavowed by the Executive.[9] Thus, it is now in the President's hands to decide whether a statute falls within the exclusive Executive recognition power—and to ignore any statute thus categorized.

The Executive's expansive position on the recognition power (adopted by the court of appeals) threatens to undermine Congress's ability to appropriately exercise its Article I powers. The Executive can now assert that it will ignore any legislation passed by Congress that the President, in his sole discretion, deems to be in tension with the President's recognition authority. Indeed, the Executive has *already* taken the position that it should not be bound by restrictions and conditions placed on the Executive by Congress through its "appropriations authority" that are at odds with recognition policy.[10] Such conditions and restrictions are a central and long-exercised feature of Congress's foreign affairs powers. *See supra* pp. 9–10. The Executive could similarly now refuse to implement the statehood-like

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[9] The Executive asserts only that this Court need not reach the question of scope, Brief for Respondent in Opposition 23 n.10, Feb. 21, 2014 [hereinafter Br. in Opp.], leaving intact the lower court's view on that issue.

[10] *See* Transcript of Oral Argument 42:3–10 ("It is the position of the executive . . . that there could be circumstances in which Congress could try to exercise its appropriations authority in a way that would preclude the executive from exercising . . . its recognition power, and that – the executive would . in some circumstances believe that it had the authority to move ahead despite those actions by Congress.").

benefits and protections conferred on Taiwan and Hong Kong by Congress, *see supra* pp. 8–9, or take an equivalent position with respect to laws governing immigration from unrecognized countries, *see supra* p. 11, or crimes committed against the officials of unrecognized sovereigns, *see supra* pp. 11–12.[11]

The "impediment" that such an "absolute, unqualified" recognition power "would place in the way of the primary constitutional duty" of the Legislative Branch to make law, including with respect to foreign affairs, "would plainly conflict with the function" of the Legislative Branch under Article I. *United States v. Nixon*, 418 U.S. 683, 707 (1974) (discussing conflict between claimed "absolute, unqualified" Executive privileged and the function of the courts under Article III). While the President properly takes the lead with respect to recognition policy, the exclusive recognition power cannot be so broad as to render unenforceable any action by Congress that implicates the subject of recognition. Such an "absolute negative on the legislature" in the hands of the Executive has from the very Founding been condemned for its potential to be "perfidiously abused," The Federalist No. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999) [hereinafter The

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[11] In light of the Executive's position here, it is also likely that criminal defendants will now raise as a defense that Congress has exceeded its powers in passing criminal statutes that govern conduct relating to unrecognized territories, particularly if the defendant passed secrets to or assaulted an official of an unrecognized government. *See supra* pp. 11–12; *Bond v. United States*, 131 S. Ct. 2355, 2360 (2011) (holding that criminal defendants have standing to raise structural constitutional challenges to federal criminal law).

Federalist], and should be rejected here. The Legislative and Executive Branches must be permitted to exercise their constitutionally-assigned foreign affairs powers in concert and in conflict, as they have done throughout our Nation's history.

5. The Executive's expansive view of the recognition power is not only inconsistent with the constitutional structure and with Congress's constitutionally assigned powers and authority in foreign affairs, *see supra* pp. 5–16, but also (a) makes little sense in light of the purposes of the President's foreign affairs powers and of the recognition power; (b) is irreconcilable with the historical practices of the political branches; and (c) its adoption by the court of appeals represents an abdication of that court's responsibility to independently examine and resolve the separation of powers question presented by this case.

a. The President is assigned those foreign affairs responsibilities that, from a functional perspective, are most properly held by an individual executive, who is institutionally situated to act quickly and decisively in response to developments overseas, and who is permanently situated in Washington, D.C. *See* The Federalist Nos. 69 & 70 (Alexander Hamilton). Thus he is the Commander-in-Chief and is assigned the responsibility to formally receive ambassadors and other dignitaries. He is also the *instrument* of foreign affairs, *i.e.*, the individual tasked with carrying out foreign policy.[12] But "to be

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[12] *See* Br. in Opp. 22–23 (asserting that "the Executive is the 'sole organ' of the Nation in foreign affairs" (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))). *But see* Donald L. Robinson, *Presidential Prerogative*

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the sole instrument [of the U.S.] and to determine the foreign policy are two quite different things." Transcript of Oral Argument 38:7–9 (Scalia, J.). The constitutional text, structure, and purpose equip and authorize Congress to play a robust role in the latter. *See supra* pp. 6–13.

The authority to formally recognize foreign sovereigns, though not found in the text of the Constitution, aligns well with these practical considerations: With quickly shifting governments and borders in foreign lands, it makes sense that the responsibility to decide which sovereign to formally recognize would rest in the hands of a single decision-maker with eyes and ears across the globe and a permanent residence in Washington, D.C. But the recognition power should not be permitted to expand from the narrow sphere in which it fulfills this functional purpose to swallow Congress's enumerated Article I powers, and its central role in the fields of immigration, naturalization, foreign trade, and foreign affairs generally.

b. The broad recognition power now claimed by the Executive also cannot be squared with the actual practice of the political branches across our Nation's history. The parties in this case muster conflicting history as to whether the recognition power is held exclusively by the President, or is shared with Con-

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and the Spirit of American Constitutionalism, in *The Constitution and the Conduct of American Foreign Policy* 114, 121–22 (David Gray Adler & Larry N. George eds., 1996) (explaining that *Curtiss-Wright* has "been ridiculed by historians and other commentators," and is rarely relied on by the courts).

gress.[13] Whatever the answer to the exclusivity question, there is an unbroken, uniform, and unchallenged set of practices with respect to the *scope* of the recognition power: Congress has regularly legislated in ways that touch on, and even register discord with, official recognition policy, in the proper exercise of its foreign affairs, immigration, naturalization, passport, appropriations, and general lawmaking powers. *See supra* pp. 8–13. None of this "abundant statutory precedent" has ever "been considered invalid as an invasion of [the President's] autonomy." *Nixon*, 433 U.S. at 445.

c. Finally, the centralization of power in the hands of the President in the form of an unchecked recognition power represents an abdication of the lower court's responsibility to decide the constitutional question presented here, and cannot be squared with this Court's prior holding on the political question issue. *See Zivotofsky*, 132 S. Ct. at 1427 (criticizing the D.C. Circuit for treating the political question and constitutionality questions as "one and the same," left to the Executive's "unreviewable" discretion (internal quotation marks omitted)). For whatever exclusive power the President may have to recognize foreign sovereigns, "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." *Id.*

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[13] While this Court looks to longstanding and consistent post-ratification practice to discern constitutional meaning, *see, e.g.*, *Mistretta*, 488 U.S. at 401; *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), it stands equally ready to set aside such evidence when it is "conflicting," *Clinton v. Jones*, 520 U.S. 681, 682, 696 (1997).

at 1428. Any deference that might in other circumstances be afforded the Executive is balanced out by the equal respect and deference due to Congress, which is presumed to act within the bounds of the Constitution. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 991–92 (1996) (O'Connor, J., concurring); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Indeed, it is "'emphatically the province and duty of the judicial department to say what the law is,'" *Zivotofsky*, 132 S. Ct. at 1427–28 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), even when Congress and the Executive agree on the scope of their respective powers. *See INS v. Chadha*, 462 U.S. 919, 941–42 (1983). Where, as here, Congress and the Executive are at odds, the Judicial Branch must, with extra care, independently evaluate the scope of the asserted powers in order to determine "whether Congress or the Executive is 'aggrandizing its power at the expense of the other branch.'" *Zivotofsky*, 132 S. Ct. at 1428 (quoting *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991)). In light of the Constitution's text, structure, and purpose, it is clear that the exclusive recognition power should be drawn narrowly by this Court so as not to trench on or engulf Congress's Article I powers.

II. SECTION 214(D) IS PROPER UNDER SEPARATION OF POWERS PRINCIPLES BECAUSE IT DOES NOT PREVENT THE EXECUTIVE FROM ACCOMPLISHING ITS CONSTITUTIONALLY ASSIGNED FUNCTIONS.

Congress does not act outside the bounds of the Constitution by legislating in ways that touch on, or even register discord with, Executive recognition policy, so long as Congress does not "prevent[] the Ex-

ecutive Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443. Section 214(d) does no such thing.

The Executive's attempt to draw an impenetrable circle around any matter that touches, however faintly, upon an issue of recognition—rendering any such legislation unconstitutional as an impermissible interference with the exercise of the recognition power—is fundamentally at odds with separation of powers principles. Such a novel veto power over Congressional action that, at most, responds to Executive recognition policy without directing the President in the act of recognition, threatens to upset "the equilibrium established by our constitutional system," *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring), and should be rejected.

1. "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Nixon*, 418 U.S. at 707. Separation of powers therefore does not "requir[e] three airtight departments of government." *Nixon*, 433 U.S. at 443 (internal quotation marks omitted); *see also* The Federalist No. 48, at 276 (James Madison) (rejecting notion of "wholly unconnected" legislative, executive and judicial departments). Rather, the Constitution "contemplates that practice will integrate the dispersed powers into a workable government," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). It thus "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.* The Constitution "provides for a degree of intermingling" not as a mere

concession to practicality, but "to ensure accountability and preclude the exercise of arbitrary power." *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring) (internal quotation marks omitted).

Accordingly, "[t]he Court, when applying [structural] provisions, has interpreted them generously in terms of the institutional arrangements that they permit." *Clinton v. City of New York*, 524 U.S. 417, 471 (1998) (Breyer, J., dissenting). One branch cannot, of course, usurp or assume a function "belonging to one of the [other] departments," The Federalist No. 48, at 276 (James Madison); *see also Chadha*, 462 U.S. at 963 (Powell, J., concurring), nor can it "interfere impermissibly with the other's performance of its constitutionally assigned function." *Chadha*, 462 U.S. at 963 (Powell, J., concurring). But where a branch acts in furtherance of its own broadly assigned powers, it does so properly so long as its actions are not unduly disruptive of the constitutionally assigned functions of the first branch. *Morrison v. Olson*, 487 U.S. 654, 691–93 (1988). Assertions of exclusive authority in such cases are treated with suspicion. *See generally id.*; *Freytag*, 501 U.S. 868.

Thus, a claim that Congress has "impermissibly interfere[d]" with an exclusive Executive prerogative is "readily resolved" in favor of constitutionality where the asserted intrusion is limited. *Nixon*, 433 U.S. at 451 (upholding statute that required former President to turn over documents, despite implied "presumptive confidentiality" for Executive communications); *see also Morrison*, 487 U.S. at 691–93 (rejecting President's contention that legislative "good cause" requirement for the removal of independent

counsel impermissibly interfered with his Article II duties). In such a case, Congress impermissibly interferes with the Executive only when it "prevents the Executive Branch from accomplishing its constitutionally assigned functions," *Nixon*, 433 U.S. at 443, and thus "significantly alter[s] the constitutional balance." *Noel Canning*, 573 U.S. ___ (slip. op. at 39) (rejecting interference-with-Executive argument rooted in *Nixon*); *accord Morrison*, 487 U.S. at 691–92 (statute violates separation of powers only when it "impede[s] the President's ability to perform his constitutional duty" or "unduly trammels on executive authority").

2. Section 214(d) does not in any way—and certainly not in any significant way—prevent or impede the Executive from accomplishing its constitutionally signed functions. Section 214(d) does not direct the President to alter U.S. recognition policy towards Jerusalem or to consider Jerusalem to be within the borders of Israel as a matter of U.S. foreign policy. It does not mandate or forbid the exercise of the recognition power at all. It merely provides a U.S. citizen with the opportunity to self-identify as being born in Israel in that citizen's travel and personal status documents.[14] To facilitate that opportunity, the statute instructs the Secretary of State to perform the ministerial act of recording "Israel" as the place of birth on the passport and consular report of birth

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[14] Indeed, in the context of passports and reports of birth abroad, the purpose of the "place of birth" designation is expressly "to assist in identifying the individual." 7 Foreign Affairs Manual 1300 et seq. App'x D (Nov. 2010) [hereinafter 7 F.A.M.] at 1310(g)(2).

abroad of an individual who avails himself of the option presented by the statute. This is, at most, an example of the kind of "integrat[ion of] the dispersed powers into a workable government," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *cf. Marbury*, 5 U.S. at 156–59 (executive officer must perform "a ministerial act which the law enjoins" on him), that is both practically necessary and constitutionally appropriate in our Republic.

Section 214(d) is thus utterly unremarkable. Indeed, the State Department already permits this act of passport self-identification in certain circumstances for U.S. citizens born in the West Bank and the Gaza Strip, 7 F.A.M. at 1360(c) & (d)—neither of which are recognized sovereigns, *see id.* at 1360(a) ("U.S. policy recognizes that . . . the West Bank and the Gaza Strip are territories whose final status must be determined by negotiations"). Thus, a U.S. citizen born before 1948 in either of those territories, as well as in Israel proper, Jerusalem, or the Golan Heights (now recognized as part of Syria), may elect to list "Palestine" as his place of birth, despite the State Department's "general policy of showing the birthplace as the country having present sovereignty." *See id.* at 1360(g). Similarly, a passport applicant born in Israel, the West Bank, the Gaza Strip, or the Golan Heights who "objects" to a place of birth listing based on present sovereignty may, regardless of date of birth, "elect" to list instead the local area or city name. *Id.* at 1360(i).

Congress also directed the Secretary of State to include "Taiwan" as the place of birth on passports and reports of birth abroad, when requested to do so by applicants born there, Foreign Relations Authorization Act, Fiscal Years 1994 & 1995, Pub. L. No.

103-236, § 132, 108 Stat. 382 (1994), even though the United States does not recognize Taiwan as a state or country, and instead takes the official position that "Taiwan is a part of China." 7 F.A.M. at 1340(d)(6)(f); *see also id.* at 1310(h) (place names described in the 7 F.A.M. appendix are also used for issuance of reports of birth abroad). In that instance—unlike this one—the Executive has complied with the directive from Congress to permit such passport self-identification. *Id.* at 1340(d)(6)(d).

3. The Executive's emphasis on the title of Section 214 (Br. in Opp. 5, 10, 23, 23 n.10)—arguing that it transforms this case into one that implicates the "core" of the recognition power because it "expressly purports to alter the President's recognition policy" (*id.* at 23 n.10)—is misplaced. Headings of statutes—and certainly titles of an entire section of a statute, rather than the provision at issue—do not have any bearing on statutory construction when the plain text of the relevant provision is clear. *See, e.g., United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1402 (2014) (finding that the party "cannot rely on the statutory heading to support its argument" where the statutory text is unambiguous); *see also Lawson v. FMR LLC*, 134 S. Ct. 1158, 1169 (2014) (reversing lower court's decision in part because of its reliance on statutory headings). Here, where "the parties do not dispute the interpretation of § 214(d)," *Zivotofsky*, 132 S. Ct. at 1427, the heading of Section 214 should be given no interpretational weight.

Further, it is the statute's actual operation—not its title—that that is the basis on which its constitutionality must be evaluated. *See Clinton*, 524 U.S. at 479 (Breyer, J., dissenting) (finding Line Item Veto Act constitutional because it is not "a true line item

veto (despite the Act's title)"); *cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595 (2012) ("Th[e] constitutional question [is] not controlled by Congress's choice of label."). Here, the statutory provision at issue, 214(d), does not in its operation alter or purport to alter official recognition policy. Nor does the Executive argue that it does.

In any case, the Executive misreads the heading in arguing that it "expressly purports to alter the President's recognition policy." Br. in Opp. 23 n.10. At most, it indicates that Section 214 as a whole was motivated in some part by the current state of "United States policy with respect to Jerusalem as the capital of Israel." Section 214 (Title). Likely it was. But Congress did not purport to alter that policy. It meant to and did no more than employ the legislative authority granted to it by the Constitution to respond to that policy by giving a U.S. citizen the opportunity to self-identify as being born in Israel. Congress does not act outside the bounds of the Constitution by legislating in ways that touch on, react to, or even register discord with, Executive recognition policy, so long as it does not prevent or significantly impede the President from exercising the recognition power. *See supra* pp. 19–22. Section 214(d) in no way does that. *See supra* pp. 22–25. To the contrary, it is the *President's* position on the breadth of the recognition power, adopted by the court of appeals, that interferes significantly with *Congress's* performance of its Article I duties, and threatens to meaningfully alter the constitutional balance in favor of the Executive.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted.

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July 22, 2014

APPENDIX

APPENDIX A:

Amici Curiae Members of The United States House of Representatives

The following members of The United States House of Representatives respectfully submit the foregoing brief as *amici curiae*:

Rep. Ed Royce (R-CA-39)
Chairman, House Committee on Foreign Affairs

Rep. Eliot L. Engel (D-NY-16)
Ranking Member, House Committee on Foreign Affairs

Rep. Michele Bachmann (R-MN-6)

Rep. Steve Chabot (R-OH-1)

Rep. Curt Clawson (R-FL-19)

Rep. Chris Collins (R-NY-27)

Rep. Paul Cook (R-CA-8)

Rep. Tom Cotton (R-AR-4)

Rep. Joseph Crowley (D-NY-14)

Rep. Ted Deutch (D-FL-21)

Rep. Sean Duffy (R-WI-7)

Rep. Eni F. H. Faleomavaega (D-Am. Samoa)

Rep. Lois Frankel (D-FL-22)

Rep. Trent Franks (R-AZ-8)

Rep. Tulsi Gabbard (D-HI-2)

Rep. Scott Garrett (R-NJ-5)

Rep. Alan Grayson (D-FL-9)

Rep. Gene Green (D-TX-29)

Rep. Janice Hahn (D-CA-44)

Rep. Steve Israel (D-NY-3)

Rep. Doug Lamborn (R-CO-5)

Rep. Leonard Lance (R-NJ-7)

Rep. Carolyn B. Maloney (D-NY-12)

Rep. Michael T. McCaul (R-TX-10)

Rep. David McKinley (R-WV-1)

Rep. Grace Meng (D-NY-6)

Rep. Luke Messer (R-IN-6)

Rep. Jeff Miller (R-FL-1)

Rep. Jerrold Nadler (D-NY-10)

Rep. Bill Pascrell, Jr. (D-NJ-9)

Rep. Erik Paulsen (R-MN-3)

Rep. Ted Poe (R-TX-2)

Rep. Ileana Ros-Lehtinen (R-FL-27)

Rep. Matt Salmon (R-AZ-5)

Rep. Adam Schiff (D-CA-28)

Rep. Aaron Schock (R-IL-18)

Rep. David Schweikert (R-AZ-6)

Rep. Brad Sherman (D-CA-30)

Rep. Pat Tiberi (R-OH-12)

Rep. Juan Vargas (D-CA-51)

Rep. Henry A. Waxman (D-CA-33)

Rep. Randy Weber (R-TX-14)

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the DC Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a nonprofit organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long taken the view that the interests of all citizens are best served when the branches of government play their assigned roles within our constitutional system, with the latitude necessary for effective governance but without overstepping their powers. Thus, Public Citizen's attorneys have been active in cases involving separation-of-powers issues, representing both parties and amici curiae.

Unlike lawyers from the Department of Justice, who must support the President in such cases, or lawyers in the Office of the Senate Legal Counsel or the Counsel to the Clerk of the House of Representatives, who side with Congress, Public Citizen's lawyers have argued for and against assertions of power by all three branches. For example, Public Citizen lawyers represented parties in cases challenging the authority of Congress to exercise a legislative veto in *INS v. Chadha,* 462 U.S. 919 (1983); to authorize its agent, the Comptroller General, to perform certain functions in the implementation of the federal budget in *Bowsher v. Synar,* 478 U.S. 714 (1986); and to retain a role, through its delegated officials, in implementing the law creating the airports authority for the Washington, DC area, *Washington Metropolitan Airports*

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

Authority v. Citizens Against Aircraft Noise, 501 U.S. 252 (1991). And in *Mistretta v. United States,* 488 U.S. 361 (1989), Public Citizen attorneys represented the defendant, who argued that the issuance of binding sentencing guidelines by the congressionally created Sentencing Commission, which included Article III judges, violated the principle of separation of powers.

On the other side, Public Citizen filed an amicus brief supporting the power of Congress to enact statutes protecting the independence of some officers performing executive functions in the face of presidential claims, similar to those here, that such laws violate his implied powers. *See Morrison v. Olson*, 487 U.S. 654 (1988) (independent counsel statute). Likewise, Public Citizen's lawyers represented six members of Congress who challenged the Line Item Veto Act—which both Congress and the President supported—on the ground that it aggrandized the President's power at the expense of Congress's in *Raines v. Byrd,* 521 U.S. 811 (1997) (dismissed for lack of standing), and then filed an amicus brief arguing against the law's constitutionality on the merits in *Clinton v. New York City,* 521 U.S. 417 (1998). *See also Public Citizen v. Dep't of Justice,* 491 U.S. 440 (1989) (arguing for petitioner that requiring compliance by the ABA's Standing Committee on the Federal Judiciary with Federal Advisory Committee Act did not violate separation of powers); *Train v. Campaign Clean Water Inc.,* 420 U.S. 136 (1975) (arguing for respondent that President did not have authority to refuse to spend funds appropriated by Congress).

As these and other separation-of-powers cases in which Public Citizen has participated show, Public

Citizen does not reflexively favor the asserted interests of any particular branch. Public Citizen also has no interest in the specific policies reflected in the statute at issue here, nor in the policies said to be served by the State Department's contrary practice. Specifically, Public Citizen takes no position either on whether it is better policy to allow citizens born in Jerusalem to designate Israel as the place of birth on their passports or to require that their passports designate Jerusalem, or on the broader issue of the status of Jerusalem. Rather, as in other separation-of-powers matters, Public Citizen appears here to advocate the position that represents the best reading of the Constitution.

SUMMARY OF ARGUMENT

This case presents a direct clash between a statute that was properly enacted by Congress in a field in which it indisputably has legislative power, and a direction by the President of the United States to his Secretary of State to disobey that statute because the President believes that it unconstitutionally interferes with his ability to conduct the foreign affairs of the United States as he sees fit. Below, the court of appeals authorized the Secretary to disregard Congress's statutory directive on the basis that implied powers of the President with respect to foreign affairs allow him to do so if he disagrees with Congress's judgment.

Contrary to the view of the court of appeals, the conduct of matters touching on foreign affairs is a shared responsibility of the President and Congress. As a general rule, when Congress acts in an area of shared authority by passing a bill that the President signs into law or that is repassed over his veto, the

President must obey that law. To be sure, there might be cases in which congressional action could invade the province of the President in the actual conduct of foreign affairs by, for example, directly assuming the role of negotiating a treaty or by strictly confining the President's options so that, in effect, he would be unable to negotiate at all. But this case is a far cry from such a situation.

The portion of the statute at issue here, section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. Law No. 107-228, 116 Stat. 1350, directs that the executive branch honor the request of a U.S. citizen born in Jerusalem that his passport state his place of birth as "Israel," instead of the President's preference, "Jerusalem." Nothing in the statute requires the President to agree that Jerusalem is part of Israel or to abandon the executive branch's policy of neutrality over which sovereign controls Jerusalem, let alone to change any position that he wishes to maintain in trying to facilitate peace in the region. Indeed, the President may make clear in public statements and in applicable State Department manuals that Congress has created the right of someone born in Jerusalem to elect to have Israel listed as his place of birth and that the President's position is that the status of Jerusalem remains an open question, to be resolved in negotiations between Israel and its Arab neighbors.

The court of appeals erred in concluding that Congress had "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions"—the applicable constitutional standard for finding a violation of separation of powers under *Nixon v. Administrator of General Services*, 433 U.S.

425, 443 (1977). The error was due in part to the court's over-reliance on dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), to find a presidential primacy in matters touching on foreign affairs that is nowhere set forth in the Constitution. The court further failed to recognize that the Constitution grants Congress express powers in the fields of international commerce and naturalization, as well as the exclusive power to appropriate funds, all of which buttress the constitutionality of the statute at issue here.

Finally, the lower court's reliance on a prior history of congressional inaction in response to what the court concluded were similar exercises of presidential power was misplaced for several reasons. Even if those prior instances had involved a direct clash with a statute, which they did not, the conclusion that inaction equals approval is unsupported. Congress may refrain from enacting legislation to override the President's exercises of executive power for many reasons other than agreement that the President's power is exclusive. These include agreement with the substance of what the President did, the inability of Congress to agree on an alternative, the press of other more important business, and, in some instances, the recognition by Congress that the President would disregard any action it took.

Attributing constitutional significance to congressional inaction is also inconsistent with this Court's decision in *INS v. Chadha*, 462 U.S. 919. If, as the Court held in *Chadha*, action by a vote of one House of Congress has no constitutional significance, then

inaction by both Houses cannot possibly have any greater effect.

ARGUMENT

Congress Has Not Infringed on Exclusive Presidential Powers or Prevented the President from Carrying Out His Assigned Constitutional Functions.

A. Properly identifying the basis for Congress's and the President's actions is crucial to deciding the constitutional question presented.

In striking the balance required in separation-of-powers cases, it is important at the outset to identify the constitutional basis on which the President and Congress are staking their claims. The power at issue in this case, however denominated, is surely a federal power, and the question is where within the federal government the power is located. Indeed, the primary significance of *Curtiss-Wright*, on which the Secretary and the lower court place so much reliance, is that it confirms that powers over foreign relations intrinsically belong to the national government and not the states, even if those powers are not specifically enumerated in the Constitution. *See* 299 U.S. at 315–18; *see also* U.S. Const. art I, § 10 (listing a series of prohibitions and limitations against states engaging in activities involving foreign nations, which, in general, mirror the grants of power to Congress in the field of foreign affairs). That the powers are federal, however, only poses, but does not resolve, the question where, within the federal government, foreign relations powers not specifically addressed in the Constitution reside.

On the presidential side, the Constitution does not expressly assign to the President the power to conduct foreign affairs generally. Indeed, neither the term "foreign affairs" nor any similar phrase appears in Article II, which sets forth the powers of the President. Nor does Article II expressly mention passports or the power, relied on by the President here, to recognize governments of foreign states.

Some presidential powers clearly relate to foreign affairs, such as the power, with the advice and consent of two-thirds of the Senate, "to make Treaties," U.S. Const. art. II, § 2, cl. 2, and with the consent of the Senate to appoint "Ambassadors, other public Ministers and Consuls." *Id.* Article II, section 3 gives to the President the responsibility to "receive Ambassadors and other public Ministers," and importantly for this case it imposes on him the duty to "take Care that the Laws be faithfully executed." And his role as "Commander in Chief" of the armed forces, *id.* § 2, cl. 1, supports his claim to a role in foreign affairs, although that power is not relied on in this case. Everyone agrees that, at least in the absence of a statute directly bearing on a foreign affairs function, the President and other executive branch officers would have the power to do many things involving relations between U.S. citizens and foreign countries, including deciding how to describe the place of birth of an American citizen on a passport.

On the congressional side, the Constitution likewise does not expressly grant Congress power in the area of foreign affairs generally or passports in particular. Several provisions, however, provide Congress with powers concerning foreign affairs. Article I, section 8, clause 1 states the power "To lay and collect

Taxes, Duties, Imposts and Excises," which plainly involves foreign nations, as does the grant in the third clause of the power "To regulate Commerce with foreign Nations." The fourth clause permits Congress to "establish an uniform Rule of Naturalization," and the tenth clause authorizes Congress "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." The next six clauses all relate to the role of Congress in the raising, funding, and regulating of military forces and the militia, including the power to declare war. In addition, the all-important power of the purse is given to Congress in Article I, section 9, clause 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." And completing the scope of congressional power is the grant in Article I, section 8, clause 18 of the authority "To make all Laws which shall be Necessary and Proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

In light of these powers expressly granted to the President and Congress, and of the necessarily federal nature of powers over foreign relations, there can be little doubt that, at least in the absence of action by the other branch, either branch would have the power to institute some form of passport system. Thus, for example, if there were no laws authorizing the issuance of passports or requiring citizens to carry them to leave or reenter the country, the President would not exceed his powers if he created a passport system to aid United States citizens abroad and facilitate their reentry into the country after foreign travel, although the system would depend on

Congress then appropriating sufficient money to pay for any additional expenses that the system would entail. Indeed, that was exactly the situation in the early years of the Republic, before the first passport law was enacted in 1856. *See Kent v. Dulles*, 357 U.S. 116, 120–25 (1958).

If the President created such a system, it would necessarily include a determination of the kinds of information that the citizen must supply and what the government would include on the passport. Under that scenario, the President surely would not exceed his authority if he decided, as he has here, that passports of persons born in Jerusalem would identify their place of birth only as Jerusalem, with no country specified. Indeed, absent a statutory requirement, it would be well within the President's powers not to include place of birth at all on U.S. passports or to include the city (as well as or in place of) country of birth in all cases.

Similarly, Congress plainly has the authority to set up a passport system to assist U.S. citizens travelling abroad and/or to control entry into this country, and, indeed, may make passports mandatory for foreign travel, as it has done. It may also assign the State Department or any other agency, including one created for this purpose alone, the task of handling all passport matters. Congress could either define the duties of the responsible agency with considerable particularity, including specifying what a passport may or must contain, or Congress could assign that responsibility to the agency based on quite general directions.

The problem in this case is that Congress has been very specific on one aspect of passport contents, and

the President has taken a different view of what that content should be. But because Congress has acted through a duly enacted law, its decision controls, unless it violates the Constitution in some respect.

Although the statutory provision at issue here concerns only the contents of passports, the function on which the lower court and the Secretary of State mainly rely for their assertions that presidential authority is supreme is the recognition of foreign governments. If the question is whether a new regime in a country is the legitimate successor to its predecessor, and an answer is needed immediately, the President may and perhaps must make that decision. And even when exigent circumstances are not present, such decisions fall to the President in the absence of congressional legislation on the subject, which is how Congress has been willing to resolve these matters over the course of our nation's history.

Section 214(d), however, presents no issue of recognition of any country, or even of resolving a dispute concerning sovereignty over a particular territory. No party contends that section 214(d) attempts to force the President to recognize, formally or even informally, the legitimacy of the claim of Israel (or any other country) to be the rightful owner of Jerusalem (although other parts of section 214 not at issue in this case push the President in that direction). And this passport provision is surely not, in the words of President Andrew Jackson, "a power the exercise of which is equivalent, under some circumstances, to a declaration of war." Andrew Jackson, *To the Senate and House of Representatives of the United States* (Dec. 21, 1836), in 3*A Compilation of the*

Messages and Papers of the Presidents 1789–1908, at 267.

Moreover, to the extent that the power of recognition rests on the need for an immediate determination, or the superior ability of the President to gather the relevant facts to make such a decision, those considerations have no bearing on this case. The facts regarding the claimed rights of various nations to Jerusalem have been equally known to Congress and the President for decades. The debate between them is over whether the interests of the United States are better served by allowing people born in Jerusalem to choose to have Israel listed as their place of birth on their U.S. passports or by requiring that all such persons have their place of birth identified only as Jerusalem. That policy debate has virtually nothing to do with where, within our federal government, the power to recognize new foreign governments is reposed.

B. The applicable test for balancing the interests of Congress and the President requires the Court to give great weight to laws passed by Congress.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court was faced with a similar separation of powers issue, although there Congress had not enacted a law with the same degree of specificity as it has in section 214(d). As this Court has observed, the "familiar tripartite scheme" from Justice Jackson's *Youngstown* concurrence provides the accepted framework for evaluating executive action in this area." *Medellín v. Texas*, 552 U.S. 491, 524 (2008). This case falls into Jackson's third category:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown, 343 U.S. at 637–38 (Jackson, J., comcurring) (footnote omitted)

Justice Jackson regarded *Youngstown* as a category three case because of his view that the President's seizure of steel mills implicitly conflicted with statutes authorizing such emergency actions in other circumstances. *Id.* at 639–40, 653. On the other hand, the Court's lead decision rested more on the absence of congressional authorization than on outright conflict with congressional enactments. *See id.* at 585–86 (majority opinion). Since *Youngstown*, however, the Court has considered two clear category three cases, both involving situations in which the President claimed, as he does here, that his implied powers trumped congressional enactments that allegedly infringed on those powers. In both cases, this Court upheld the statutes against such claims, and its analyses provide direct and useful guidance here.

In *Nixon v. Administrator of General Services*, 433 U.S. 425, the Court considered a statute that required former President Richard Nixon to turn over papers

and tapes from his administration to the General Services Administration, which would then review them and make them public with certain exceptions. Although the Constitution does not expressly empower the President to control access to his papers, the Court recognized a "presumptive confidentiality of Presidential communications." *Id.* at 440. The principal separation of powers issue, then, was whether the statute trumped the former President's right to decide who would have access to his presidential papers for the purpose of determining whether they would be publicly disclosed under the statute. To answer that question, the Court stated the test as follows:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. [683,] 711–712 [(1974)]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

433 U.S. at 443. The Court then rejected the claim that the limited intrusion contemplated by the statute would interfere with executive prerogative. *Id.* at 451. The specifics of the interests at stake in that case are not relevant here, but the test—"the extent to which [the statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions," *id.* at 433—and the outcome—holding the President's

interests subservient to the statutory mandate—are instructive.

Morrison v. Olson, 487 U.S. 654, similarly involved a clash between an implied presidential power and a duly enacted statute. The separation of powers issue was whether the Independent Counsel Act deprived the executive branch of "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. The Court first quoted the test from *Nixon v. Administrator*, 433 U.S. at 443, and then answered the question by upholding the law. Again, the Court's balancing process is relevant here, although not the interests on either side of the specific case.[2]

C. *Curtiss-Wright* has no bearing on this case.

Before applying the *Nixon v. Administrator* test to this case, it is essential to explain why, contrary to the views of the Secretary and the position of the lower court, the decision in *Curtiss-Wright*, 299 U.S. 304, has no bearing on the outcome of this case. Unlike here, the issue in *Curtiss-Wright* was not whether presidential power overrode an act of Congress, but whether a statute *conferring authority* on the President was unconstitutional. Congress had passed a joint resolution (another name for a statute enacted into law by Congress and signed by the President)

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[2] Both *Nixon* and *Morrison* also involved claims that the laws at issue violated specific provisions of the Constitution designed to protect the interests of the party challenging the law. Those issues were not resolved using the separation-of-powers test set forth in the text. In this case, the President makes no similar text-based claim, and the applicable test is therefore the one enunciated in *Nixon*.

making it a criminal offense to sell arms to either party to an armed conflict between Bolivia and Paraguay if the President determined that prohibiting such sales would contribute to peace between the two countries. The President had made such a finding, and both the sufficiency of the President's determination and the constitutionality of the statute were challenged by a defendant indicted for conspiring to sell machine guns to Bolivia. *See id.* at 311–14. The presidential determination did not oppose the joint resolution but implemented it, and the Court held that Congress had the power to delegate such authority to the President in light of the President's significant role in developing and implementing foreign policy. *Id.* at 321–22.

Thus, *Curtiss-Wright* was, in Justice Jackson's *Youngstown* terminology, a category one case: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). The footnote immediately following that sentence in Justice Jackson's opinion leaves no doubt about what category *Curtiss-Wright* occupied in his thinking:

> It is in this class of cases that we find the broadest recent statements of presidential power, including those relied on here. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. ... It was inti-

> mated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.

Id. at 635 n.2. Because the instant case, in contrast, is a category three case, *see supra* pages 11–12, *Curtiss-Wright* has little bearing on its outcome.

Moreover, as Justice Jackson observed, "[m]uch of the Court's opinion [in *Curtiss-Wright*] is dictum." 343 U.S. at 635 n.2. The opinion's broad dicta treat the role of the President in foreign affairs as if it were expressly granted in the Constitution, and overlook the many ways in which Congress has been assigned authority in areas relating to foreign affairs. Indeed, the opinion fails to note the obvious points that, absent congressional legislation, the President certainly would have lacked the power to criminalize the arms sales at issue, and that the legislation that was essential to that result necessarily involved an exercise of *congressional* power with respect to a matter that touched on foreign affairs.

In addition, the circumstances described in *Curtiss-Wright* as those in which the President *should* have the primary role are oceans apart from the issue of what birthplace should be listed on an American citizen's passport. Justice Sutherland described those circumstances as follows:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

> Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

299 U.S. at 319–20.

Justice Sutherland's invocation of the treaty negotiation power to support the sweeping proposition that only the President can speak for the nation in matters touching foreign affairs surely goes too far. In any event, section 214(d) has nothing to do with speaking as a representative of the United States, negotiating a treaty, or acting in time of war. Moreover, Congress had equal access to the relevant information here (unless the President has withheld it during Congress's deliberations), and a law enacted to control the contents of passports poses no issue of premature disclosure of information. In short, even if the considerations set forth in *Curtiss-Wright* were not dicta, they would have no bearing on the narrow issue presented by section 214(d).[3]

Moreover, other decisions of this Court demonstrate that the President does not have unfettered power to act contrary to statute in matters

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[3] The amicus brief of historian Louis Fisher in support of petitioner contains an in-depth analysis of the errors in the *Curtiss-Wright* dicta.

involving foreign relations. For example, an early decision, *Little v. Barreme,* 6 U.S. (2 Cranch) 170 (1804), held that a statute enacted by Congress trumped a contrary presidential order. The law at issue in *Little* made it illegal for American vessels (broadly defined) to send cargo *to* France or its colonies. The President sent instructions to the Navy to seize vessels if they were coming to or *from* France and its colonies. *Little* involved the seizure of a vessel coming *from* a French island. The Court held that, despite the President's orders, the seizure was unlawful, and the Navy captain who had seized the vessel had to pay damages.

Little demonstrates the Court's recognition of the primacy of statutes as against a presidential order, more than a century before *Nixon v. Administrator.* Moreover, because in *Little* the President was acting pursuant to his express Commander-in-Chief powers involving a plainly military matter, his authority should have been at its apex. Nonetheless, the military officer who had followed his orders, and might have been disciplined had he questioned them, was held personally responsible for not adhering to the limits in the statute. The harshness of the result for the Navy captain underscores how strong the interest of the President must be to overturn an otherwise lawful statute.

Similarly, *Medellín v. Texas,* 552 U.S. 491, rejected the President's claim that his treaty-making power impliedly granted him the power to implement a treaty that was not self-executing. The President's position in *Medellín* was stronger than it is here because Congress had not enacted a law that took a diametrically opposite position from the President's.

This Court nonetheless treated the President's act as a nullity:

> When the President asserts the power to "enforce" a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second.

Id. at 527. While *Medellín* is distinguishable in many respects, it further confirms that, even in a foreign affairs situation governed by a treaty, the President's implied powers are limited when Congress has exercised its own Article I powers.

D. The President's recognition powers are not at issue in this case.

The court of appeals and the Secretary attempt to justify the claim of unconstitutionality by asserting that providing a U.S. citizen the choice of designating either Israel or Jerusalem as his place of birth undermines what the Secretary asserts is the President's exclusive constitutional authority to recognize foreign governments. Petitioner's brief discusses the history and meaning of the recognition power at length; this brief will make only two points.

First, the text of the Constitution does not commit the recognition power to either the President or Congress. Therefore, the most logical conclusion is that the power is shared. An example illustrates the sense of this conclusion: Suppose in a foreign country a new government takes over from the prior one after a coup. The President wishes to recognize the new government, send an ambassador, and establish an

embassy there. Before doing so, however, he needs the Senate to confirm his ambassador and Congress to appropriate funds to operate the embassy. Thus, as a practical as well as legal matter, powers implicating recognition cannot reside in the President alone.

Second, the Court in this case need not answer the question where the recognition power finally lies. Section 214(d) has no impact at all on the issue of recognizing which country has the right to govern Jerusalem. The President's asserted recognition power and his ability to negotiate treaties designed to achieve peace in the Middle East are unaffected by section 214(d).

E. Section 214(d) does not prevent the executive branch from accomplishing its constitutionally assigned functions.

As to the question presented in the case, the applicable standard is the one set forth in *Nixon v. Administrator*: "the extent to which [section 214(d)] prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443. As discussed above, no one in the executive branch has "constitutionally assigned functions" regarding the contents of passports, passports generally, or even the conduct of foreign affairs. The President's role in those functions is implied, just as is that of Congress. Even assuming that conducting foreign affairs is an executive function, neither the Secretary nor anyone else has demonstrated any concrete harm that will befall the United States if the place of birth on petitioner's passport (and that of any other Jerusalem-born American who so requests) says Israel.

According to the Secretary's response to petitioner's discovery request, the reason for including the place of birth on a passport is solely to assist the Department in distinguishing among the millions of U.S. passport holders, which include 10 million new or renewed holders each year. *See* JA 42, 69–70. The Secretary has not claimed that this limited function will be impaired by replacing Jerusalem with Israel for those who prefer that designation.

Moreover, although the President's signing statement expressed opposition to the *entirety* of section 214 (of which the passport provision is one of four parts) as an "interference" with presidential authority,[4] no President or Secretary of State has offered any support for the claim that substantial harm will result if the place-of-birth provision is implemented. The only justification offered for refusing to abide by the statute is contained in the answer to Interrogatory 5 posed to the Secretary and answered by the Director of the Office of Israel and Palestine Affairs. *See* JA 52–59. The answer mainly recites the history of the Department's position on designating Jerusalem as the place of birth and contains no specifics, other than that Palestinian groups complained when the law was passed.

Nixon v. Administrator, however, requires *some* showing of harm to an interest of the executive branch to overcome the force of a statute. Although the Secretary has complete access to whatever evidence might be available to support his claim of

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[4] *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers of the Presidents of the United States: George W. Bush (Sept. 30, 2002).

injury to the foreign relations of the United States, such a showing has not been made here.

Other parts of section 214, not at issue in this case, do reflect differences in the policy approaches of the President and Congress as to both the status of Jerusalem and the impact that a U.S. policy symbolically acknowledging Israel's claims to Jerusalem would have on negotiations for peace between Israel and its neighbors. The Secretary takes the position that Congress has no policy role in foreign affairs. That position could be sustained, however, only if the Court accepted the claim that the executive branch has exclusive authority to act in all matters of foreign policy. Yet the cases cited by the court of appeals for such supremacy do not deal with the President's powers versus those of Congress, but only with his powers versus those of the states, *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 415 (2003), or the judicial branch, *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410 (1964). When it comes to making federal policy, however, Congress is the elected representative of the people. As in *Youngstown,* where this Court affirmed Congress's primary policymaking role as against that of the President, the President's exercise of claimed implied powers does not override policy choices reflected in legislation passed by Congress and enacted into law. Nonetheless, here, this Court need not resolve this question because the only provision at issue does not directly implicate control over the foreign policy of the United States with respect to the status of Jerusalem.

As to the indirect impact of section 214(d) on U.S. foreign relations, the means chosen by Congress to allow a citizen to express his or her passport

preference produce very limited, if any, adverse effects, even viewed from the perspective of the executive branch. Thus, Congress did not direct the Secretary to include Israel on the passport of all American citizens born in Jerusalem, which might look to some as official government policy or even recognition of the status of Jerusalem. Instead, Congress gave the citizen a choice. By providing such a choice, section 214(d) is neutral on the question of Jerusalem's status, and merely accommodates the differing views of U.S. citizens insofar as they relate to the designation of their own places of birth. Furthermore, nothing prevents the Secretary from amending the Department's Passport Manual, or making any other public statement, to explain that the designation of Israel as the place of birth on passports of citizens born in Jerusalem who elect that designation does not constitute the official position of the United States on Jerusalem, but instead reflects the personal choice of the citizen. Under all these circumstances, there is no basis to conclude that the operation of section 214(d) "prevents the Executive Branch from accomplishing" any function, let alone any of "its constitutionally assigned functions."

The limited impact of allowing this kind of choice can be seen from a similar law regarding passports for American citizens born in Taiwan. Enacted in 1994, that law permitted U.S. citizens born in Taiwan to have Taiwan listed as their place of birth on their passports, even though the United States did not recognize Taiwan as a country. As described more fully in petitioner's brief (at 12–13, 21–22) and in the contemporaneous documents the Secretary provided in discovery, JA 150–68, 178–92, the same kinds of objections raised here were raised by the Administra-

tion then with regard to the likely response of China, but adverse effects did not materialize. Moreover, the State Department responded to the Taiwan passport law by issuing its statements to make clear that the law did not reflect a change in U.S. policy toward either Taiwan or China. *See* JA 150–58. That same course of action is fully available here.

F. Congressional silence is not relevant in this case.

The Secretary argues that Congress, by going along with the President's prior acts in the supposedly related area of recognition of foreign governments, has effectively either (a) interpreted the Constitution in an authoritative manner that accords the President this power, or (b) by its silence ceded the power to the President. The court of appeals agreed with the Secretary that the long history of unilateral presidential action on recognition, in which Congress supposedly "acquiesced," supports the conclusion that the President has exclusive recognition power and that, therefore, section 214(d) unconstitutionally infringes on that power. For several reasons, the court of appeals erred in concluding that the history on which it relied is relevant here.

First, section 214(d) does not require any change in the recognition policy of the United States. In this case, the issue is passports, not recognition, and a statute stands in the way of the President's preference, which was not the case in any of the examples cited by the court of appeals.

Second, congressional "silence" is generally of dubious relevance as a logical matter for many reasons. Lack of response is relevant only if Congress (as a whole) has plainly heard the message and there

is a strong basis for assuming acquiescence. Even assuming that Congress as a whole understood that a presidential action (such as the recognition of a foreign government) was based on a claim of exclusive authority, the absence of a legislative response might reflect congressional agreement with the substance of the action as opposed to the claim of exclusive authority. Or Congress may have taken no further action because to propose, discuss, and pass a resolution objecting would have been an ill use of congressional time. Or Congress may have viewed the situation as an impasse as to which nothing further could be achieved by legislation in the face of presidential obduracy, and in which other solutions, such as lawsuits by individual Members of Congress, were likely to prove unavailing. *See Raines v. Byrd*, 521 U.S. 811.

Third, this Court in *INS v. Chadha*, 462 U.S. 919, held that Congress could act in a manner that affected persons outside Congress only by compliance with the Presentment Clause of Article I, section 7, which requires both Houses of Congress to agree and the President to concur, unless each House can muster a two-thirds vote to override a veto. The one-House veto in *Chadha* was unconstitutional because it did not satisfy the Presentment Clause. But if *action* by *one* House of Congress, which at least overcomes the sub-constitutional objections to the use of silence to imply consent, is of no effect, then surely *inaction* by *both* Houses cannot have effect.

This principle, which is spelled out in greater detail in Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 Geo. Wash. L. Rev. 1211

(2013), applies with special force in this case. In many cases cited in that article, the issue was one of statutory interpretation or in some cases what to do when statutes were unclear on whether Congress had delegated a power to the executive branch. In such cases, silence would be used at most to fill a gap that could plainly be closed by Congress. Here, by contrast, there is *no* gap and no silence: Congress has spoken clearly on the precise issue of what a passport may say as place of birth for a person born in Jerusalem.

As for the notions that history shows that Congress interprets the Constitution to give the President the power at issue here, or that Congress has somehow ceded the power to the President through acquiescence, these theories cannot hold because Congress never purported to do any such thing, silently or otherwise. Moreover, this Court, not Congress, has the final say on the meaning of the Constitution. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *see also Chadha,* 462 U.S. at 960 (Powell, J., concurring in the judgment) (veto unconstitutional because House "assumed a judicial function in violation of the principle of separation of powers").

The idea that Congress has ceded constitutional power by silence is particularly offensive to the principles of *Chadha*. It assumes not only that Congress can act without passing legislation, but also that Congress has the right to give away its constitutional power, much the way that a landowner can lose title to his property through a claim of adverse possession. That approach must fail because the principles of separation of powers were not enshrined in our Constitution for the three branches

to rearrange as they may find convenient. Thus, in *Clinton v. City of New York*, 524 U.S. 417, Congress had passed a law allowing the President to exercise a line item veto over parts of a law with which he disagreed. Although the President and Congress both supported this realignment of the legislative function, this Court held that the statute violated the Presentment Clause, which requires the President to sign or veto the entirety of a bill presented to him for his signature. Because Congress cannot by statute alter the allocation of powers between it and the President under the Constitution, it surely cannot accomplish that same end by failing to respond when a President takes action that is not authorized by law and is beyond his express constitutional authority. *See* Morrison, 81 Geo. Wash. L. Rev. at 1230 (arguing that neither action nor inaction can shift constitutional power by "adverse possession").[5]

The Court's recent decision in *Noel Canning v. NLRB*, 134 S. Ct. 2550 (2014), does not alter this analysis. That case did not concern implied powers. The issues on which the majority and the concurrence differed related to the meaning of two phrases in the recess appointment clause in Article II, section 2, clause 3: "may happen" and "the Recess of the Senate." The first question addressed by the Court

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[5] The *Chadha* objection does not apply in situations in which there is no claim of acquiescence that results in a transfer of power. Rather, the claim in such cases is that a long history of a practice suggests that the action being challenged has been accepted as consistent with separation of powers. *See Mistretta v. United States*, 488 U.S. at 401 ("Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.").

was whether the phrase "the Recess of the Senate" is limited to the recess that occurs between the first and second sessions of every Congress or also applies to other periods when the Senate is not in session. The second question was whether the recess power is limited to vacancies that first arise when the Senate is in recess, or whether it also applies to vacancies that arise before the Senate goes into recess.

The majority rejected both limitations. In doing so, it relied on the history of Senate and presidential actions regarding recess appointments as a guide to understanding the meaning of those phrases, while also considering the purpose and practical realities of governing that underlay the recess appointment power. The majority stressed that it did not rely on mere "silen[ce] or passiv[ity]" by the Senate, and it recognized the difficulties posed by relying on congressional inaction. *See* 134 S. Ct. at 2564. Even so, the concurring Justices found a different meaning in the history, which underscores the difficulty in placing heavy reliance on inferences drawn from events as to which there is no definitive agreement about what the parties understood had happened or about the significance of any reaction (or lack thereof) of one branch to action by the other.

Debatable as such inferences may be, the opinions in *Noel Canning* cite history to attempt to show a common understanding among the branches of the actual words used in the Constitution. In light of those words, particular appointments made by past Presidents either were or were not proper, and congressional actions reflecting acceptance of such presidential appointments could provide at least some evidence of a shared understanding that the actions

were not improper under the controlling constitutional text.

Unlike *Noel Canning*, this case does not involve an interpretation of constitutional text: No words in the Constitution assign foreign affairs, let alone passports, to one branch or the other. Thus, here, both the lower court and the Secretary seek to do more with the history that they cite: They offer it to establish that Congress has, in effect, agreed with the President that he has the sole right to fill a constitutional void. Such an inference is particularly unwarranted in an area of shared authority where, in the absence of conflicting congressional legislation, Congress would have no basis for objecting to unilateral presidential action. Past instances of congressional inaction regarding the President's recognition of foreign governments, where such recognition did not violate any statute, cannot support the legitimacy of presidential action here, in the face of Congress's enactment of a law that mandates action directly contrary to that preferred by the President.

Finally, if congressional acquiescence could result in a forfeiture of powers held by Congress, presidential acequiescence could likewise result in forfeiture of powers held by the President. And as noted above, when Congress passed a law directing the State Department to use Taiwan as the place of birth for Americans born there, the President objected but complied. But although presidential acquiescence presents no comparable Presentment Clause problem, his prior passivity is equally irrelevant in assessing separation of powers claims. Just as Congress might not object to presidential actions allegedly infringing its authority for any number of reasons, a President

might choose to go along with a law for any number of reasons, even when he believed that it infringed on his authority.

Moreover, even if a President affirmatively approved the law, persons injured by the law would not be precluded from raising their constitutional objections. Separation of powers is not just for the benefit of the incumbent, but also protects future Presidents and Congresses, as well as all Americans who depend on separation of powers to protect their rights and liberties. "So convinced were the Framers that liberty of the person inheres in structure [separation of powers] that at first they did not consider a Bill of Rights necessary." *Clinton*, 524 U.S. at 450 (Kennedy, J. concurring); *see Chadha*, 462 U.S. at 935–36 (upholding standing of a private party to enforce separation-of-powers claim of President against Congress).

As this Court observed in *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011), "[i]n the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances." Here, too, the claim of an individual is at issue. Just as the President's acceptance of congressional overreach does not bar the claim of an individual who suffers as a result, *see, e.g.*, *Chadha*, 462 U.S. at 941–42), Congress's failure to object to past presidential claims of exclusive authority cannot deprive petitioner of the protections that the Constitution affords him.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In 2002 Congress enacted legislation requiring the Secretary of State, upon request, to record the birthplace of a Jerusalem-born U.S. citizen as "Israel" on his passport and consular report of birth abroad. *See* Foreign Relations Authorization Act of 2003, Pub. L. No. 107-228 § 214(d). The President has refused to comply with this statutory directive, and has instructed the Secretary to continue recording "Jerusalem" and not "Israel" as the place of birth for every Jerusalem-born U.S. citizen. The question presented is:

Whether the President holds not merely an inherent but an *exclusive* constitutional prerogative to decide whether to stamp "Jerusalem" or "Israel" as the place of birth on the passports of Jerusalem-born U.S. citizens, without regard to any congressional enactment that purports to legislate on this question.

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In the Supreme Court of the United States

No. 13-628

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The amicus curiae has an interest in ensuring that executive-branch policies remain responsive to Congress—the only branch of the federal government in which the States are represented. The amicus curiae has a further interest in countering executive-branch unilateralism, which erodes the structural hurdles to federal lawmaking that protect individual liberty and state prerogatives.

SUMMARY OF ARGUMENT

Constitutional text emphatically supports Congress's decision to enact section 214(d). Article I, § 8 empowers Congress "to regulate [c]ommerce with foreign nations," and this encompasses the power to issue and regulate the content of passports needed for international travel. Even if one were to accept the broadest possible construction of the President's duty to "receive Ambassadors and other public Ministers," that would show at most that the President's power over Zivotofsky's passport is *concurrent* with Congress—not exclusive of Congress. And there is no text in Article II (or anywhere in the Constitution) that suggests an exclusive Presidential power to determine the boundaries of a foreign state, the names of birthplaces to be stamped on passports, or to establish U.S. policy toward Israel without regard to congressional wishes.

There is also no historical evidence to support an exclusive Presidential prerogative in these areas. The court of appeals could not uncover *any* evidence that anyone who drafted or ratified the Constitution understood that document to confer a so-called "recognition" power on the President that would authorize him to brush aside congressional enactments such as section 214(d). All that the court of appeals could muster were post-ratification anecdotes in which the President recognized foreign countries without congressional authorization. But none of that is evidence of an *exclusive* Presidential power that would allow the executive to countermand an Act of Congress. There is a constitutional chasm between an *inherent* Presidential power to act without congressional

authorization and an *exclusive* Presidential power to act in defiance of an express congressional prohibition. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). The court of appeals elided this most basic distinction in separation-of-powers law.

The court of appeals also ignored (or buried in footnotes) the many historical episodes and opinions from this Court indicating the "recognition" power is not exclusive to the President but is shared with Congress. *See* Robert J. Reinstein, *Is The President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 8, 14, 25 (2013). And in all events, it does not follow from an "exclusive" Presidential power to recognize foreign governments that the President holds the additional power to resolve international territorial disputes without regard to congressional wishes. Nor does it follow that the President holds the still further power to prevent Congress from allowing individual citizens to express their dissent from the executive's views on their passports. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713 (1977). The power that the executive asserts in this case is at least three penumbras removed from the President's Article II duty to "receive Ambassadors and other public Ministers," and the Secretary of State cannot cite *any* historical episode or court decision in which this supposed power has been allowed to override an Act of Congress. A ruling for the Secretary will inaugurate a new, substantive-due-process-like doctrine of executive power, where the President is empowered to push aside democratically enacted

legislation in the name of supposed "constitutional" powers that have no textual footing in the document, but that the President nevertheless believes *should* belong exclusively to him.

Finally, to the extent that judicial skepticism toward section 214(d) stems from fears that Congress will be insufficiently attuned to the nation's diplomatic interests, these concerns are unfounded. The requirements imposed by section 214(d) are exceedingly modest. Section 214(d) does not require the President to recognize Israeli sovereignty over Jerusalem; it does not require or allow "Jerusalem, Israel" to appear on U.S. passports; and it requires "Israel" to appear as the place of birth only upon the request of a Jerusalem-born passport holder. And in all events, the Framers of our Constitution were far more concerned with the dangers of executive-branch unilateralism in the field of foreign affairs, where a President's policies can be unduly shaped by international opinion or desires to enhance his legacy rather than what the American people want. In this case, the people's representatives in Congress have spoken clearly and unequivocally in enacting section 214(d). Their decision is entitled to the President's respect, whether he approves of it or not.

ARGUMENT

When the President's actions contradict an Act of Congress, his powers are at their "lowest ebb," and the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring); *see also Medellin v. Texas*, 552 U.S.

491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action"). It is not enough to show that the decision whether to stamp "Jerusalem" or "Israel" on Zivotofsky's passport falls within the President's Article II powers. The Secretary must also show that this decision falls *outside* Congress's Article I powers.

The Secretary cannot make this showing. The "recognition" power on which he relies is not an exclusive Presidential power. And even if it were, it would not prevent Congress from giving Zivotofsky the freedom to choose whether to have "Jerusalem" or "Israel" appear as the place of birth on his passport.[1]

I. THE SO-CALLED RECOGNITION POWER IS NOT EXCLUSIVE TO THE PRESIDENT

Constitutional text must be the starting point in any separation-of-powers dispute. Article I gives Congress several powers relevant to the recognition of foreign governments and the content of U.S. passports—such as the power to regulate foreign commerce and the power to establish uniform rules of naturalization. In addition, the necessary-and-proper clause empowers Congress to enact laws "Necessary" to carrying into Execution not only the powers granted to Congress, but *also* the Powers granted to the President or any other "Department or Officer." *See* U.S. Const. art. I, § 8. Yet the court of

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[1] Section 214(d) also gives Zivotofsky the right to have "Israel" appear as his place of birth on his consular report of birth abroad. For simplicity, we will refer only to "passports" throughout the brief.

appeals did not even consider Congress's Article I powers before proclaiming that the President "exclusively holds" the power to recognize foreign governments. *See* Pet. App. 20a.

Neither did the Secretary. His brief in the court of appeals discussed the text of Article I only *after* it had declared the President's recognition power to be "exclusive." *See* Brief for Appellee at 45–50, *Zivotofsky ex. rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197 (D.C. Cir. 2013) (No. 07-5347) ("D.C. Cir. Appellee's Br."); *id.* at 50 ("Congress may not act upon a subject that the Constitution commits exclusively to the President."); *see also* Brief for Resp't at 34, *Zivotofsky ex. rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) ("Br. for Resp't").

This is a textbook example of begging the question. Whether the President holds an exclusive or concurrent "recognition" power *depends* on whether Article I empowers Congress to legislate on matters related to the recognition of foreign governments, territorial disputes, and the content of passports. One cannot declare the President's "recognition" power to be exclusive without considering the text of Article I, and then dismiss Zivotofsky's reliance on Article I on the ground that Congress is forbidden to invade the President's "exclusive" powers. Instead, one must consider the text of Article I in the course of deciding whether the "recognition" power is concurrent or exclusive.

A. Constitutional Text Establishes That Any "Recognition" Power Is Concurrent With Congress, Not Exclusive Of Congress.

Congress's Article I prerogatives include the "powers" to "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. Article II, by contrast, provides that "[t]he executive Power shall be vested in a President of the United States of America," and imposes a duty on the President to "receive Ambassadors and other public Ministers." The question is whether these constitutional provisions are most sensibly read to confer a "recognition" power that is: (a) exclusive to the President, or (b) held by or shared with Congress.

The power to "regulate Commerce with foreign Nations," when combined with the necessary-and-proper clause, allows Congress to legislate on recognition-related matters. Even under pre-New Deal case law, the term "commerce" has always been understood to include trade as well as transportation and the movement of persons and goods between nations. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987). And trade agreements with foreign nations cannot occur unless the United States recognizes the foreign govern-

ment as a legitimate sovereign. Recognition is not merely "necessary" in the sense of being "conducive" to foreign-trade regulation, it is strictly necessary for a trade agreement between foreign nations to take place. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–15 (1819) (rejecting the view that the necessary-and-proper clause extends only to laws that are "absolutely necessary" to carrying into execution an enumerated power, and holding that a law need only be "conducive" to that end). Recognition is also "necessary" for carrying into execution the power to "make Treaties," and the all-important second part of the necessary-and-proper clause allows Congress to enact laws conducive to executing powers given to "any Department or Officer," including the President. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003). The government cannot "make" a treaty without first recognizing the sovereign with whom the treaty is made. *Cf.* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005); *Bond v. United States*, 134 S. Ct. 2077, 2098–2102 (2014) (Scalia, J., concurring). So even under the narrowest constructions of the treaty power, the foreign-commerce clause, and the necessary-and-proper clause, Congress may legislate on recognition-related matters.

The Secretary presents no argument to the contrary. His brief in the court of appeals acknowledged Congresss's enumerated powers "over immigration and foreign commerce," but never explained how those powers (when combined with the necessary-and-proper clause) stop short of authorizing Congress to legislate on recognition-related issues. Indeed, the Secretary did not even

mention the necessary-and-proper clause. The Secretary's only response has been to assert that Congress cannot use its enumerated powers to infringe the President's "exclusive" recognition powers. *See* D.C. Cir. Appellee's Br. at 50 ("Congress may not act upon a subject that the Constitution commits exclusively to the President."). But that simply assumes what is to be decided—whether the President holds an *exclusive* recognition power rather than a concurrent power shared with Congress. And that question cannot be answered without *first* determining the scope of Congress's enumerated powers.[2]

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[2] Judge Tatel assumed that section 214(d) fell within Congress's enumerated powers, but held that the President's "recognition" power operated as an "independent restriction" on congressional power akin to the First Amendment. *See* Pet. App. 51a. The President's Article II powers, however, do not withdraw or revoke powers that Article I confers on Congress. They either establish concurrent powers (for those that fall within the enumerated legislative powers of Congress) or exclusive powers (for those that fall outside Congress's enumerated powers). *See Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring). When this Court has invalidated congressional legislation on separation-of-powers grounds, it is not because an overarching "separation of powers" principle imposes independent limitations on Congress's Article I prerogatives, but because Article I did not empower Congress to enact the legislation in the first place. Congress's Article I powers, for example, extend only to "legislative Powers," which necessarily exclude any involvement by Congress in the execution or administration of the laws. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926); *see also* U.S. Const. art. I, § 1 ("*All legislative Powers herein granted* shall be vested in a Congress of the United States") (emphasis added). To (continued...)

Worse, the Secretary has failed to identify *any* constitutional language that establishes an exclusive "recognition" power for the President. The only provision on which the Secretary has relied is the "receive ambassadors" clause in Article II, § 3. *See* D.C. Cir. Appellee's Br. at 2, 10, 16. But even assuming that an executive-branch "recognition" power can be derived from the "receive Ambassadors" clause, that *still* does not establish an exclusive Presidential prerogative. Article II, § 3 imposes a *duty* on the President to receive ambassadors; it is not phrased as a grant of "power" and it does not say that the President holds the sole prerogative to decide which ambassadors to receive (or which countries to recognize) without any regard to congressional wishes. If Congress specifically withholds appropriations needed to establish diplomatic relations with a foreign government, then the President must accede to Congress's wishes. *See* U.S. Const. art. I, § 9. The mere existence of an Article II power does not establish that the power is exclusive of Congress. The President serves as Commander-in-Chief of the armed forces; that does not mean the President can direct the armed forces to torture enemy combatants if Congress, pursuant to its Article I power "[t]o make Rules for the Government and Regulation of the land and naval Forces," has enacted legislation criminalizing torture. *See* 18 U.S.C. §§ 2340–2340A.

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concede that section 214(d) falls within the powers described in Article I, as Judge Tatel did, is to admit that the presidential powers asserted in this case are concurrent and not exclusive.

The Secretary has also gestured toward Article II's "vesting" clause throughout this litigation. *See* D.C. Cir. Appellee's Br. at 19; Br. for Resp't at 3. But the Secretary has never explained how the "vesting" clause could empower the President to countermand an Act of Congress. Article II's vesting clause gives the President "the *executive* Power"—a power to execute (*i.e.*, to carry out and not violate) the Constitution and laws that Congress enacts. Unless the Secretary can show that section 214(d) is unconstitutional for reasons independent of Article II's vesting clause, the President cannot be claiming to "execute" the laws by disregarding this congressional enactment. The vesting clause, standing alone, gives the President no leverage when he acts in defiance of a federal statute. *See Youngstown*, 343 U.S. at 641 (Jackson, J., concurring) ("I cannot accept the view that [the vesting] clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.").

B. Congress Has Repeatedly Enacted Legislation On Matters Of Recognition, And Past Congressional Acquiescence To The President's Unilateral Recognition Decisions Is Not Evidence Of An Exclusive Presidential Recognition Power.

The constitutional text unambiguously supports Congress's decision to enact section 214(d)—or, for that matter, any statute dealing with recognition of foreign governments. Nevertheless, the Secretary and the court of appeals try to concoct a constitutional prohibition against section 214(d) by relying on post-ratification episodes in which Presidents have recognized foreign gov-

ernments without congressional input or authorization. *See* D.C. Cir. Appellee's Br. at 29–44; Br. for Resp't at 18–24; Pet. App. 17a–22a. In their view, this evidence shows that Congress lacks the constitutional authority to legislate on recognition-related matters because past Congresses have been content to allow the President to go it alone. The Secretary's briefing and the court of appeals's opinion bear all the hallmarks of law-office history: incomplete and selective recitation of relevant historical episodes, cursory dismissal of the history supporting Zivotofsky's position, and unsupported assumptions that Congress's past inaction or acquiescence was motivated solely by the belief that Congress lacked constitutional authority to act.

The first problem is that the court of appeals's historical analysis is woefully incomplete. There are many episodes in which Congress has enacted statutes governing recognition of foreign governments—and most of these went unmentioned in the court of appeals's opinion. In 1800, for example, Congress enacted legislation recognizing French sovereignty over the island of Hispaniola—even though Spain continued to govern the eastern half of the island. *See* Act of Feb. 27, 1800, ch. 10, § 7, 2 Stat. 7, 10 ("The whole of the island of Hispaniola shall for the purposes of this act be considered as a dependency of the French Republic."). In 1806, Congress enacted the Haitian Non-Intercourse Act, which reaffirmed French sovereignty over Haiti even though Haiti had recently declared its independence. *See* Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351 (prohibiting trade between the United States and persons "resident within

any part of the island of St. Domingo, not in possession, and under the acknowledged government of France."); *Clark v. United States*, 5 F. Cas. 932, 934 (C.C.D. Pa. 1811) (Washington, J.) ("We view the law of 1806 ... as a clear acknowledgement of the sovereignty of France over the island."). These statutes received nary a mention in the court of appeals's opinion.

The court of appeals barely acknowledged Congress's 1862 legislation recognizing Haiti and Liberia. *See* Act of June 5, 1862, ch. 96, 12 Stat. 421 ("An Act to authorize the President of the United States to appoint Diplomatic Representatives to the Republics of Hayti and Liberia"). The court of appeals tried to pass off this statute as a mere appropriations law, but the statute says that it "authorize[s]" the President to appoint diplomats to those countries—indicating that the President would *not* have had this authority absent the statute. *Id.* And even if this were nothing more than an appropriations law, that would only confirm that Congress may participate in recognition decisions by deciding whether to appropriate funds needed to implement the President's policy. This statute (along with the 1800 and 1806 statutes recognizing French sovereignty over Hispaniola and Haiti) proves that there is no "longstanding and consistent practice" excluding Congress from recognition decisions.

Then there is the congressional joint resolution of 1898 recognizing Cuba's independence from Spain. *See* Act of Apr. 20, 1898, ch. 24, 30 Stat. 738, 738. Entitled "Joint Resolution For the recognition of the independence of the people of Cuba," this resolution declared that "the people of the Island of Cuba are, and of right ought

to be, free and independent." *Id.* The court of appeals noted that the Senate "did not act" on a *different* joint resolution proposed by the House, but omitted any acknowledgement or discussion of the joint resolution that *was* enacted after being approved by each House of Congress and signed by President McKinley.

Finally, the court of appeals never bothered to mention the most significant piece of congressional recognition legislation: the Taiwan Relations Act of 1979. *See* Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)). Congress enacted this law shortly after President Carter recognized the communist regime on mainland China, and although this act does not formally recognize Taiwan, it nevertheless requires Taiwan to be treated as the functional equivalent of a sovereign nation. The Act allows Taiwan to assert foreign sovereign immunity and the "act of state" doctrine in U.S. courts, and establishes an embassy-like entity for conducting diplomatic relations. The Secretary claims that the President holds the exclusive authority not only to decide whether to recognize foreign governments but also "to determine the policies that govern recognition questions." D.C. Cir. Appellee's Br. at 18; *see also* Br. for Resp't at 29 ("The President's recognition power ... includes the power to determine the policy which is to govern the question of recognition and the power to ensure that recognition policy is consistent with the United States' foreign-policy interests.") (citations and internal quotation marks omitted). The Taiwan Relations Act could not survive this assertion of exclusive executive power, as it purports to establish the "polic[y]

that govern[s]" recognition questions surrounding Taiwan and mainland China. The continued existence of this act refutes any claim that "longstanding and consistent practice" leaves all recognition-related policy decisions exclusively with the President.

The second problem with the court of appeals's opinion is that episodes of congressional "acquiescence" do not indicate that Congress believed it lacked constitutional authority to act. The court of appeals cited several episodes in which Congress backed away from enacting recognition legislation in the face of objections from the President. *See* Pet. App. 21a–24a. But these laws could have failed for any number of reasons unrelated to beliefs about Congress's constitutional powers. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67 (1988). Perhaps these proposals failed because the recognition policies were too controversial to obtain majority support. Perhaps the President persuaded legislators that the proposed recognition policy was misguided. Perhaps political horsetrading caused members of Congress to back the President in exchange for concessions on other issues. It is untenable to assume that these proposals all failed because of some belief that recognition decisions are none of Congress's business. *See* Robert J. Reinstein, *Is The President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 26, 33 (2013) (providing evidence that these proposals failed for other reasons). That members of Congress have continued to propose and enact recognition-related legislation after these incidents suggests the opposite.

The third and most serious problem is that the Secretary's evidence of past congressional acquiescence is irrelevant to a claim of *exclusive* executive power. The President has never exercised this so-called recognition power in the teeth of a congressional prohibition, so the historical episodes cited by the Secretary support (at most) an inherent or concurrent recognition power that the President may exercise without awaiting specific congressional authorization. That is a far cry from an *exclusive* recognition power that licenses the President to disregard an Act of Congress.

Presidents do not acquire "exclusive" constitutional powers through acts of adverse possession. Past episodes of congressional acquiescence to executive-branch unilateralism may serve as evidence that Congress has implicitly approved or authorized the President's unilateral actions. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981). But they do not and cannot change the scope of Congress's constitutional powers vis-à-vis the executive. For more than 50 years Presidents acquiesced to "legislative vetoes"; it was not until 1976 that President Ford decided that this practice infringed his constitutional powers and started to resist Congress's encroachments. *See* Statement on Signing the Department of Defense Appropriation Act of 1976, 1 Pub. Papers 242 (Feb. 10, 1976). Yet this Court invalidated the legislative veto in *INS v. Chadha* by relying solely on constitutional text and structure; the executive's past acquiescence to "legislative vetoes" was irrelevant. *See Chadha*, 462 U.S. at 946, 959. Congress's acquiescence to past executive-branch "recognition" decisions are equally irrelevant

here. Congress cannot augment its constitutional powers through repeated acts of aggression against a supine executive; neither can it relinquish its prerogatives through continual acts of passivity. The President would not lose his constitutional power to issue pardons if a century's worth of Presidents decided (for whatever reason) to stop issuing them.

What's more, *Youngstown* considered and rejected the notion that past acts of *unilateral* Presidential actions and congressional acquiescence can establish an *exclusive* Presidential power that disables Congress from legislating on the subject. When President Truman defended his seizure of the steel mills by pointing to past Presidential seizures of businesses undertaken without congressional authorization, this Court would have none of it:

> It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or in any Department or Officer thereof."

Youngstown, 343 U.S. at 588–89. Congress does not lose its Article I powers through erosion or atrophy.[3]

Most importantly, Congress has *not* acquiesced to the President's decision to stamp "Jerusalem" rather than "Israel" on the passports of every Jerusalem-born U.S. citizen. So even if the Secretary were correct to assert that previous Congresses uniformly "acquiesced" to the notion that anything related to recognition falls exclusively in the President's bailiwick, the Congress that enacted section 214(d) did not share that view. And Congress is allowed to change its views on what the Constitution means—no less than the President and this Court, who have jettisoned constitutional views espoused by their predecessors. *See, e.g., Citizens United v. Fed.*

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[3] *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), offers no help to the Secretary's efforts to establish an *exclusive* Presidential recognition power. *Noel Canning* is (at worst) a Category Two case in Justice Jackson's framework—where the President acts "in absence of either a congressional grant or denial of authority." *Youngstown*, 343 U.S. at 637. It is entirely appropriate to consider past executive practice and past congressional acquiescence when dealing with those types of executive-power claims. *See Dames & Moore*, 453 U.S. at 654. This is a Category 3 case—where the President asserts the right to act in defiance of an Act of Congress. Past congressional acquiescence is relevant only to the extent that Congress has acquiesced to the President's violations of congressional enactments. Nothing in *Noel Canning* purports to authorize the President to disregard an appropriations law that seeks to curb his use of recess appointments—even if those appointments comply with the majority opinion's interpretation of the recess-appointments clause. *See* 5 U.S.C. § 5503(a)(1) (withholding salaries from certain recess appointees).

Election Comm'n., 558 U.S. 310, 365 (2010); Letter regarding the Defense of Marriage Act from Eric Holder, U.S. Attorney Gen., to John Boehner, Speaker of the House (Feb. 23, 2011). Why Congress should be boxed into the constitutional views allegedly held by its predecessors—while the President and the Supreme Court remain free to abandon even longstanding constitutional interpretations held by those institutions—has never been explained. *See United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) ("[O]ne legislature may not bind the legislative authority of its successors.") (citing 1 William Blackstone, Commentaries *90). "Longstanding practices" can be changed—so long as they remain consistent with constitutional text and structure. The Secretary seems to believe that post-ratification practice is a ratchet that turns only in the direction of expanded executive power.

C. This Court Has Never Held That The Recognition Power Is Exclusive Of Congress.

Without any constitutional text or historical evidence to support an exclusive Presidential recognition power, the Secretary and the court of appeals rely on two lines of court decisions. The first involves decisions upholding Presidential decisions to recognize foreign governments without first obtaining congressional authorization. *See, e.g.*, *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). The second involves cases in which this Court has described the President as either the "sole organ" of the nation in foreign affairs, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), or as one who holds the "vast share

of responsibility" for our foreign relations, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)). None of these cases establish that Congress is forbidden to legislate on recognition policy.

Consider first the *Belmont* and *Pink* line of decisions. These cases held only that the President may recognize foreign governments without first securing congressional authorization. *See Belmont*, 301 U.S. at 761; *Pink*, 315 U.S. at 229–30. They did not hold or imply that Congress was disabled from using its Article I powers to legislate on recognition-related matters, and they did not consider that question because there were no federal statutes prohibiting the President's actions. Using these cases to support an *exclusive* Presidential recognition power is sophistry. No one is contending that the President must await explicit congressional permission before deciding whether to recognize Israel's sovereignty over Jerusalem.

The court of appeals was aware of the fact that *Belmont*, *Pink*, and similar cases held only that the President may wield the recognition power without congressional authorization—not that the President holds an "exclusive" recognition power that can dispatch congressional legislation on the subject. *See* Pet. App. at 30a ("[T]he [Supreme] Court has not *held* that the President exclusively holds the [recognition] power."); *id.* at 53a ("[T]he Supreme Court has had no occasion to definitively resolve the political branches' competing claims to recognition power.") (Tatel, J., concurring). Yet the court of appeals nevertheless held that it was *compelled* by

these cases to enforce an *exclusive* Presidential recognition power and nullify section 214(d). According to the court of appeals, this Court has stated in "carefully considered ... dictum" that the President's recognition power is exclusive of Congress, and these dicta (according to the court of appeals) must be obeyed by inferior courts. *See id.* at 30a; *id.* at 54a (Tatel, J., concurring). There are three problems with this analysis.

First, the "dicta" on which the court of appeals relied were not "carefully considered." None of the opinions considers or discusses whether *Congress* can legislate on recognition. And to the extent these opinions refer to an "exclusive" recognition power, they do so only in the context of holding that *courts* lack the authority to second-guess the executive's recognition decisions. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

Second, there are plenty of "dicta" from this Court going in the opposite direction. *See, e.g.*, *Belmont*, 301 U.S. at 328 ("[W]ho is the sovereign of a territory is not a judicial question, but one the determination of which by *the political departments* conclusively binds the courts.") (emphasis added); *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign ... of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges ..."); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643 (1818) ("[T]he courts of the union must view such newly constituted government as it is viewed by the legislative

and executive departments of the government of the United States."). Although it is understandable that the court of appeals would choose to follow the dicta from this Court that support its desired result, it still must provide *reasons* for choosing to follow that line of dicta over the other.

Finally, even if the court of appeals could pretend that its hands were tied by dicta in cases like *Sabbatino*, this Court is assuredly not bound by those dicta, which receive no weight beyond their ability to persuade. *See, e.g.*, *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."). Any decision to establish an "exclusive" Presidential recognition power must be defended on its merits, not by acting as if this Court had long ago resolved the issue.

That leaves the Secretary and the court of appeals to fall back on *Curtiss-Wright*-type statements that foreign affairs are the sole responsibility of the executive. *See Curtiss-Wright*, 299 U.S. at 319 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (quoting 6 Annals of Cong. 613 (1800)); *Garamendi*, 539 U.S. at 414 (recognizing the President's "vast share of responsibility for the conduct of our foreign relations") (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("The President is exclusively responsible" for the "conduct of diplomatic and foreign affairs"); *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981) (noting the "delicate, plena-

ry and exclusive power of the President as the sole organ of the federal government in the field of international relations"). This Court, however, has *never* held that the President may disregard an act of Congress by asserting that he is the "sole organ" of the nation when it comes to foreign affairs. And for good reason: the idea that Congress is constitutionally forbidden to legislate on matters affecting international relations is preposterous. Congress holds the power to declare war, regulate foreign commerce, establish a uniform rule of naturalization, and define and punish offenses against the law of nations. Congress further holds the power to withhold appropriations from foreign policies that it disapproves, and even the most unabashed executive-power enthusiasts acknowledge that the President must comply with funding restrictions imposed by Congress. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996). *Curtiss-Wright*'s "sole organ" language cannot mean that the President may push aside any Act of Congress that interferes with his authority to conduct foreign relations.

The Secretary has been vague about what he thinks *Curtiss-Wright* actually means. The Secretary prudently acknowledges that "[t]he Constitution distributes the powers over external affairs between the Executive and Legislative Branches." D.C. Cir. Appellee's Br. at 19; Br. for Resp't at 3. Yet the Secretary cannot resist invoking *Curtiss-Wright* and the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *Id.* at 27 (cit-

ing *Curtiss-Wright*, 299 U.S. at 319–20). One would think that these are mutually exclusive propositions. If the President is indeed the "*sole* organ of the federal government in the field of international relations," then it would not be correct to simultaneously assert (as the Secretary does) that "[t]he Constitution distributes the powers over external affairs between the Executive and Legislative Branches." The only way to reconcile these statements is to acknowledge that the President acts as the "sole organ" of the nation in its foreign relations—but only when Congress has authorized or acquiesced in his actions. *See Youngstown*, 343 U.S. at 588–89; *id.* at 635–37 (Jackson, J., concurring). But the Secretary is not citing *Curtiss-Wright* to support that more limited conception of executive power, because everyone in this case acknowledges that section 214(d) prohibits the President's actions.

The only way that *Curtiss-Wright* can help the Secretary is if the President's supposed status as the "sole organ" in foreign relations allows him to act not only in the absence of congressional authorization but also in the teeth of a specific congressional prohibition. This view of *Curtiss-Wright* would make the President an elected monarch over everything related to foreign affairs, and allow him to disregard not only section 214(d) but any other statute that the President deems to interfere with his conduct of foreign relations. Perhaps the Secretary is invoking *Curtiss-Wright* only as a fallback argument, but the Secretary still has an obligation to explain just how far he thinks this *Curtiss-Wright* dispensing power should extend. Congress legislates all the time on mat-

ters affecting international relations—and often does so against the President's wishes. Does the Secretary believe that President Reagan could have disregarded the statute imposing sanctions on South Africa that Congress enacted over his veto?

In all events, *Youngstown* rejected the notion that *Curtiss-Wright* might allow the President to displace an Act of Congress, and limited *Curtiss-Wright* to situations in which Congress has delegated authority to the President or acquiesced in his actions. *See id.* at 587–89; *id.* at 635 n.2 (Jackson, J., concurring) ("*Curtiss-Wright* ... involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress."). But that has not stopped executive-branch lawyers from invoking *Curtiss-Wright* to justify the President's disregard of congressional enactments. Indeed, the Secretary has barely mentioned *Youngstown* in his briefing to this point. The brief in opposition filed by the Solicitor General does not cite *Youngstown*, and the brief filed in the court of appeals does not mention Justice Jackson's framework until page 50. *See* D.C. Cir. Appellee's Br. at 50. The Jackson framework is, however, the starting point for all claims of executive power—even when that framework is not conducive to the claims that the President is making. *See Medellin*, 552 U.S. at 524; *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring).

II. EVEN IF THE PRESIDENT HOLDS AN EXCLUSIVE "RECOGNITION" POWER, SECTION 214(d) DOES NOT INFRINGE THAT POWER

Even if one assumes that the Secretary could somehow establish an *exclusive* Presidential "recognition" power from its post-ratification anecdotes and cases, section 214(d) is still constitutional because it does not require the President to recognize Israel's sovereignty over Jerusalem. Section 214(d) simply provides an outlet for individual passport holders to express their own views about how their place of birth should be characterized. And it avoids the unseemly (and constitutionally dubious) spectacle of forcing international travelers to carry and present documents espousing a message of which they strongly disapprove. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713 (1977). Section 214(d) is consistent with our long tradition of respecting the freedom of conscience of every American—even when their views diverge from official government policy. This congressional effort to accommodate dissidents does not recognize Israel's sovereignty over Jerusalem.

Statutes such as section 214(d) are hardly unprecedented. U.S. citizens born in Taiwan have the right to choose whether to have "Taiwan" or "China" marked as the place of birth on their passports—even though the executive branch does not recognize Taiwan as a country and acknowledges that "there is only one China, and that Taiwan is part of China." *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994) (as amended by State Department: Technical Amendments, Pub. L. No. 103-415,

§ 1(r), 108 Stat. 4299, 4302 (1994)); 7 FAM § 1340 App. D d(6); Joint Communique on the Establishment of Diplomatic Relations between the United States of America and the People's Republic of China (January 1, 1979). The State Department also allows people born in Israel to designate their place of birth as a town or village rather than "Israel." *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002); 7 FAM § 1360 App. D (g); 7 FAM § 1380 App. D (a). The United States is not rejecting Israel's sovereignty over Tel Aviv by giving individuals born there the freedom to choose whether to keep "Israel" off their passport. Neither is it recognizing Israel's sovereignty over Jerusalem by offering Zivotofsky the choice provided in section 214(d). So long as that decision belongs to private individuals and is not dictated by Congress, the Secretary has no plausible claim that section 214(d) recognizes Israel's sovereignty over Jerusalem or infringes the President's alleged prerogative to decide whether to recognize foreign governments.

The court of appeals's opinion does not even address this point. Judge Tatel (to his credit) attempted to answer this argument in his concurrence, but his effort falls far short. *See* Pet. App. 57a–61a. Judge Tatel tried to distinguish the Taiwan statute and other allowances by observing that these policies entitle individuals to substitute a city or region for the country in which they were born, while section 214(d) runs in the opposite direction—allowing Zivotofsky to use the name of a country when the United States denies that country's sovereignty over his city of birth. *See id.* at 58a. True enough,

but that does not answer Zivotofsky's argument that a statute that merely gives an individual the freedom to choose how he will characterize his place of birth is not an official act of recognition.

Judge Tatel offered only two arguments to support his claim that section 214(d) "implicates recognition." First, he noted that the Secretary has claimed that implementing section 214(d) would have "adverse foreign policy consequences." *Id.* at 59a But that has no bearing on whether section 214(d) is an act of recognition. Many decisions to recognize (or not to recognize) foreign governments have no adverse foreign-policy consequences. And many decisions that have adverse foreign-policy consequences have nothing to do with recognition. *See, e.g.*, *Medellin*, 552 U.S. 491 (executing foreign nationals); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (taxing multinational corporations). The Secretary cannot nullify section 214(d) by predicting dire consequences for American foreign policy. The Secretary must instead show how section 214(d) constitutes an act of recognition—and that inquiry is independent of the alleged harms that will befall American diplomacy.

Second, Judge Tatel relied on legislative history and surrounding statutory provisions to assert that "Congress intended section 214(d) to alter recognition policy with respect to Jerusalem." Pet. App. 61. This too is a non-sequitur. Whether section 214(d) is constitutional depends on what the statute does, not on what may have going on in the minds of the legislators who voted for it. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law

that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Judge Tatel relied on floor statements and conference reports, but these cannot be attributed to Congress as a whole. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body."). Finally, federal statutory subsections are presumed severable, so a court should not invalidate section 214(d) on the guilt-by-association theory propounded by Judge Tatel. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Would section 214(d) become constitutional if Congress were to re-enact it, shorn of the surrounding statutory provisions and the conference report describing it as "related to the recognition of Jerusalem as Israel's capital"? *See* Pet. App. 60a–61a.

The Secretary, like the panel opinion, makes no attempt to explain how offering passport holders a choice in how they characterize their place of birth is an act of recognition—other than to assert that the President holds the exclusive power not only to recognize foreign governments but also to resolve any "questions of U.S. policy regarding the State." D.C. Cir. Appellee's Br. at 17. By now, however, the Secretary has strayed far beyond a power to recognize foreign governments and into an exclusive Presidential power to decide any policy question related to a recognized foreign state—and to countermand any Act of Congress that gets in his way. The history and cases on which the Secretary relies offer no support for *this* type of Presidential prerogative, even

if one assumes that those sources could establish an exclusive Presidential power to recognize foreign governments (and they don't). It is important to remember that the constitutional text on which the Secretary relies provides only that the President "shall receive Ambassadors and other public Ministers." From that piece of constitutional text the Secretary has purported to derive a penumbral power to recognize foreign governments, and then a power to determine the boundaries of foreign states in the emanations from that penumbra, and then finally a power to dictate the "place of birth" designations on the passports of U.S. citizens in the penumbra of that emanation from the original penumbra. This is more than a penumbra too far. Even if one were to accept the Secretary's dubious assertion that an *exclusive* Presidential power to recognize foreign governments can be derived from past episodes in which Presidents have recognized foreign governments without specific congressional authorization, that can support *at most* a prerogative to decide whether or not to recognize a foreign government—not to resolve every question of U.S. policy tangentially related to foreign boundary disputes.

In the end, the Secretary's grievance against section 214(d) is not that it recognizes Israel's sovereignty over Jerusalem but that it might ruffle diplomatic feathers or interfere with U.S. peacemaking efforts in the Middle East. *See* D.C. Cir. Appellee's Br. at 10 ("Recording 'Israel' as the place of birth of U.S. citizens born in Jerusalem *would be perceived internationally as* a reversal of U.S. policy on Jerusalem's status") (emphasis added) (citation and internal quotation marks omitted); *id.* at 14

("[I]f 'Israel' were to be recorded as the place of birth of a person born in Jerusalem, such unilateral action by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians would critically compromise the United States' ability to help further the Middle East peace process.") (citation and internal quotation marks omitted). That is not a basis on which a court can invalidate an Act of Congress. *Cf. Medellin*, 552 U.S. at 525–26. A passport that simply marks "Israel" as the place of birth—and only at the request of the passport holder—does not signify recognition of Israeli sovereignty over Jerusalem, and the policy in section 214(d) can easily co-exist with the President's calculated agnosticism on the status of Jerusalem. Section 214(d) is an eminently reasonable compromise that accommodates the conscience of Jerusalem-born passport holders who believe that Jerusalem belongs to the state of Israel, while allowing the President to maintain his policy that the status of Jerusalem should be resolved through negotiations.

III. CONGRESS HAS LEGISLATED RESPONSIBLY ON ISRAEL-RELATED MATTERS

Without any constitutional text that contradicts section 214(d), and without any history or case law to establish an exclusive Presidential prerogative over the contents of Zivotofsky's passport, there is no basis for declaring section 214(d) "unconstitutional"—even if it may be imprudent from the standpoint of diplomacy. Throw in the presumption of constitutionality that attaches to an Act of Congress and this should not be a close case. *See Ogden v. Saunders*, 25 U.S. 213, 270 (1827) ("It is but a

decent respect due to the ... legislative body, by which any law is passed, to presume in favo[]r of its validity, until its violation of the constitution is proved beyond all reasonable doubt.").

Yet every D.C. Circuit judge to have considered the constitutionality of section 214(d) has voted to invalidate it. *See* Pet. App. 48a, 61a; *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1245 (D.C. Cir. 2009) (Edwards, J., concurring) (vacated by *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012)). Some of the judicial hostility to this statute may reflect an institutional belief that Congress will be tone-deaf to the nation's diplomatic needs if it is allowed to enact statutes such as section 214(d). This attitude proceeds from a jaundiced perception of Congress, viewing its members as parochial and interested primarily in scoring political points with powerful interest groups. And it takes an overly romanticized view of the executive, seeing the President as one who looks out for the interests of the nation or the world.

There is nothing to support this cynical and all-too-common view of the relative institutional capacities of Congress and the executive. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. Rev. 1217 (2006). Congress has shown itself to be acutely sensitive to the foreign-policy implications of statutes relating to Israel, often amending its proposed legislation to accommodate the President's concerns. When Congress considered the Jerusalem Embassy Act in 1995, the initial proposal would have required the President to move the U.S. embassy to Jerusalem. But when President Clinton argued that this

could harm the Middle East peace process, Congress watered down the law and allowed the President to issue continuous six-month waivers of the re-location requirement. *See* 141 Cong. Rec. 28965–66 (1995) (remarks of Sen. Feinstein concerning executive concerns); *id.* at 28967–68 (letter from the Secretary of State expressing administration concerns); *id.* at 28994 (introduction of Sen. Dole's amended version of the Act). Presidents Clinton, Bush, and Obama have repeatedly invoked those waivers, and Congress has not forced the President to re-locate the embassy.

Congress also took a measured approach in enacting section 214(d). Sensitive to the foreign-policy implications, Congress did not require "Jerusalem, Israel" to appear on passports but only "Israel," and then only at the request of the individual passport holder. Those who view the passport will have no reason to know whether the passport holder was born in Jerusalem, so an "Israel"-stamped passport will not signify anything regarding the status of Jerusalem.

Although the President continues to object even to this limited measure, Congress is allowed to conclude that the executive's concerns are not persuasive, or that it is more important to respect the freedom of conscience of citizens like Menachem Zivotofsky and his parents, who believe strongly that Jerusalem belongs to Israel, and who should not be forced to carry badges espousing the President's belief that Jerusalem is no-man's land. Congress is entitled to decide that diplomacy should take a back seat to other important values.

Finally, the Framers of our Constitution were far more concerned with the opposite institutional problem: that the President's foreign policy (if left unchecked by Congress) will become unduly influenced by self-serving legacy concerns or international opinion rather than what the American people want. *See* The Federalist No. 75 ("An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents."). The power to declare war was given to Congress, rather than the President, because of concern that Presidents (like European monarchs) would be tempted to start wars over petty squabbles with foreign leaders. *See* Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 2 *Letters and Other Writings of James Madison*, 1794–1815, 131 (1865). In like manner, Presidents can become too conciliatory to foreign opinion—especially second-term Presidents who will no longer face the electorate. The Constitution ensures that the President's policies will remain accountable to Congress and therefore to the people in whom ultimate sovereignty resides. That remains the case even if the views adopted by the people depart from what counts as politically correct opinion on the international stage.

IV. A RULING THAT INVALIDATES SECTION 214(d) WILL ESTABLISH A DANGEROUS PRECEDENT

This Court has never before held that the President's foreign-affairs powers may trump an Act of Congress. A ruling for the Secretary will establish a new and potentially far-reaching doctrine of executive power, which could be used to justify all manner of Presidential disre-

gard of congressional enactments. It is hard to imagine how this Court could write a narrow opinion in the Secretary's favor, because the power that the Secretary asserts has no textual basis in Article II and is (at best) only marginally related to the President's time-honored practice of recognizing foreign governments without congressional authorization.

The Secretary is asking this Court to establish a substantive-due-process-like doctrine for executive power, which would allow Presidents to nullify democratically enacted legislation based not on the text of the Constitution but on "longstanding practice[s]." D.C. Cir. Appellee's Br. at 44; *cf. Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Substantive due process is controversial enough in the individual-rights context. *See, e.g.*, *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting) ("[T]his Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."). Its mode of reasoning should not be extended into executive-power disputes.

First, as this case demonstrates, Presidents will attempt to expand the scope of their powers by defining "longstanding practice" at a high level of abstraction. The historical evidence cited by the Secretary shows only that the President has recognized foreign governments without congressional authorization. Yet the Secretary has used this evidence to defend a much broader Presidential prerogative: the power to resolve "other questions of U.S. policy regarding the [recognized]

state," without regard to whether Congress has authorized, acquiesced in, or prohibited his actions. D.C. Cir. Appellee's Br. at 17. The Secretary is seeking to expand Presidential power by boosting the level of generality at which he defines the relevant "longstanding practice"—just as some jurists have sought to expand judicial power in substantive-due-process cases by defining traditionally respected rights at higher levels of abstraction. *Compare Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.), *with id.* at 137–41 (Brennan, J., dissenting). Even if this Court were to demand that the "longstanding practice[s]" be defined with specificity, that will not ensure that future Presidents or courts will follow the instruction—especially when a ruling for the Secretary will require this Court to resort to *some* degree of abstraction.

Second, the President already has a means for enforcing the non-textual prerogatives that he believes he should have, and that is his veto power. *See* Thomas Jefferson, Opinion Against the Constitutionality of a National Bank (1791) in 3 *Writings of Thomas Jefferson* ("The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature"). Whatever the merits of recognizing atextual substantive-due-process rights in the individual-rights context, there is no justification for courts to invoke atextual Presidential powers as a reason to nullify an Act of Congress. The President (unlike individual litigants) is armed with a veto power, and he was given that power to protect not only his textual constitutional prerogatives but also the extra-constitutional powers that he believes

his office should have. The courts should not step in to nullify congressional legislation except to enforce the enumerated Presidential powers in Article II.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MENACHEM BINYAMIN ZIVOTOFSKY,
by His Parents and Guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY.,

Petitioner,

–v–

JOHN KERRY,
Secretary of State,

Respondent

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia**

BRIEF OF TRUE TORAH JEWS INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Although directed to do so by statute, the Secretary of State refused to record "Israel" as the birthplace on a passport issued to a Jerusalem-born American citizen. The question presented is whether this refusal, without more, satisfies the injury-in-fact requirement for standing under Article III of the Constitution as interpreted by this Court.

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INTEREST OF AMICUS CURIAE [1]

True Torah Jews Inc. ("TTJ") is a nonprofit organization of Orthodox Jews, directed by rabbis, who reject the essentially secular political ideology known as "Zionism." TTJ's interest as amicus curiae is rooted in a deep commitment to the teachings of traditional Judaism—and it sees Zionism as running contrary to those teachings by pursuing a political (and military) solution to the problem of Jewish exile. TTJ's immediate interest is to make one fact clearly understood: that the Zionists do not speak for traditional Orthodox Jews, or for "the Jews" generally, either in this country or in the Holy Land (or elsewhere). This fact is obscured by the briefs submitted by petitioner's Zionist and Zionist-oriented amici. It is most important to grasp this fact when it comes to the "expansionist" Zionists—those dedicated to a vision of a "Greater Israel," with borders beyond the Green Line of the 1949 armistice. (Some *non* expansionist Zionists, as suggested below, have a different vision.)

The Projects of the Expansionist Zionists, and Their Consequences

The expansionist Zionists seek to realize their vision by every available means. One of their

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[1] This amicus curiae brief is filed with the consent of all parties; consent letters are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no party, or counsel for any party, made a monetary contribution intended to fund the preparation or submission of this brief.

political-legal projects involves the statute on which petitioner Zivotofsky stakes his entire claim. That statute provides that a Jerusalem-born U.S. citizen may, on request, have "Israel" shown as the birthplace on his passport. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003 (the "Act"), § 214(d), Pub. L. 107-228, 116 Stat. 1350 (2002) ("Section 214(d)"). Section 214(d), for the expansionists, is a step toward one goal: U.S. recognition of Jerusalem as the capital of the State of Israel ("Israel"). Yet every U.S. President since 1948 has refused to grant such recognition, the Middle East being what it is, on the grounds that it would be damaging *to the United States* in its foreign relations.

Undeterred by the consistent argument based on damage to *U.S.* interests, the expansionist Zionists lobbied Congress to enact Section 214(d); they now ask this Court to enforce it. The statute serves no apparent U.S. interest, and no cognizable interest (as TTJ will argue) of any U.S. citizen. But it does advance one of the expansionists' cherished aims—coinciding, as it does, with an explicit and unvarying desideratum of the *Israeli* political leadership over the decades.

In the scheme of things, the significance of Section 214(d) is only incremental.[2] But every

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[2] This enables petitioner's amici to argue that the statute is almost trivial, *see* Brief of Anti-Defamation League ("ADL"), American Israel Public Affairs Committee ("AIPAC"), et al. at 5 (Section 214(d) "simply authorizes a limited ministerial act"), or *so* trivial that it seemingly has no substance, *see* Brief of Louis D. Brandeis Center for Human Rights Under Law ("LDB"), et

incremental advance moves the ball toward the goal. And all of the expansionist Zionists' projects, taken together with their consequences, can be hung on "the Jews" or "the Jewish people": that is just what TTJ deprecates. If this is true of the Jerusalem project, it is true *a fortiori* of their grander and even more consequential activities—including their core long-term project: the steady (and now rapid) growth of Jewish settlement in the Occupied Territories of the West Bank.

The Need to Put the Interest of TTJ in Context

"Is it good for the Jews?" is the punchline of an old joke. But it is no joke that, in the eyes of many who don't share their vision of a "Greater Israel," the expansionist Zionists' political actions and rhetoric (here and in Israel) have already saddled "the Jews" with moral responsibility for the tragic, and arguably inevitable, consequences of their settlement project and related policing and military operations. This is not the occasion to consider those consequences—for the occupying power's own people (the Israelis), for the indigenous Palestinian Arabs, or for the prospects for regional peace and international security. Yet these weighty issues are implicated in the vulnerable position in which world Jewry increasingly finds itself—and this includes the traditional Orthodox Jews of the TTJ rabbis' own communities.

The Zionists' views on these matters are frequently presented to the American public, and generally understood in a positive light, even if their

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al. at 3 (by enacting statute, Congress "acknowledg[ed] that Jerusalem may be a 'place' in Israel").

implications are not fully appreciated: they are part of the background of our national political discourse. The views of TTJ and the traditional Orthodox are seldom even acknowledged, and always marginalized. So to put TTJ's interest in context, it is necessary to set out briefly its views on three subjects: on the status of Jerusalem (internationalize it), on the role Jews *as such* should play in making U.S. foreign policy (none), and on whether the State of Israel is in fact the state of "the Jewish people" (no, it isn't).

While needing more space to explain its *interest*, TTJ can make its *legal argument* in quite short order (see below). TTJ will propose a way to dismiss the case on narrow procedural grounds. The argument is as non-political as can be.

Status of Jerusalem: a Widely-Shared Position on the Political Question

The TTJ rabbis take the long view (in keeping with ancient tradition), but they recognize that at present their uncompromising judgment on Zionism puts them in a distinct minority of observant Jews nationally; by TTJ's estimate, some two hundred thousand Jews in the United States fully share the TTJ position on religious grounds. On at least one important issue, however, the situation is different: on the status of Jerusalem, TTJ's overall position is actually held by many who are not traditional Orthodox Jews.

TTJ maintains that Jerusalem, the "holy city" for Jews and many gentiles, should not serve as the *exclusive* capital of the State of Israel. Rather, in any

comprehensive peace agreement, Jerusalem should be treated in relevant respects as an *international city*, a free zone for all its residents.[3] For TTJ, this position is grounded in traditional Jewish teachings. Others hold the same general position on different grounds; there are also differences on crucial details and in fundamental outlook. But the approach commands broad agreement from a great range of practicing (and non-practicing) Jews of various stripes, including *non-expansionist* Zionists, who consider Israel's policies unsustainable and self-destructive.[4]

The existence of such diverse Jewish opposition to expansionist Zionism, including *Zionist* opposition, is not hinted at in the briefs of petitioner's amici.

U.S. Foreign Policy Should Be Made in the Interest of the United States

Unlike some of petitioner's amici, TTJ is not in the general business of influencing U.S. foreign policy, by lobbying or otherwise. Specifically, in

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[3] This position on Jerusalem was presented to the United Nations General Assembly's Ad Hoc Committee on the Palestinian Question in November 1947 by the Chief Rabbi of the Ashkenazic Jewish Community in Jerusalem. He wrote (as the Committee put it) "voicing apprehension at the proposal to include Jerusalem in a Jewish State, and urging that Jerusalem become an international zone under the United Nations, with all its residents citizens of this free zone." U.N. Dag Hammarskjöld Library, A/AC.14/44 (25 Nov. 1947), *available at* http://www.truetorahjews.org/images/telegrams-received-by-UN-Nov-1947.pdf.

[4] *See, e.g.*, Gershom Gorenberg, *The Unmaking of Israel* (2012) (orthodox-Jewish Israeli Zionist).

contrast with petitioner's Zionist amici, TTJ does *not* seek to shape U.S. policy to serve the interests (real or as perceived) of the State of Israel, or of any other foreign state.[5] So, for example, TTJ rejects the suggestion that something called "the agenda of the Jewish people" should encompass pushing for a particular U.S. policy on Israel. *See* Brief of Int'l Ass'n of Jewish Lawyers and Jurists at 1.

To the contrary, TTJ embraces the proposition—a truism, except where Israel is involved—that U.S. foreign policy should be made and conducted on the basis of *the legitimate interests of the United States*, and in conformity with applicable moral and prudential norms. In this light, TTJ opposes as a general matter *any lobbying by Jews as Jews* in the foreign-policy field—and it specifically opposes any such lobbying to advance the interests (again, real or perceived) of the State of Israel. (This general policy is not a straitjacket: for example, TTJ supports humanitarian efforts like the October 1943 march of Orthodox rabbis to the White House, petitioning for action against the destruction of European Jewry.)

TTJ grounds its opposition to lobbying for Israel by Jews *as Jews* mainly on an understanding of the teachings of traditional Judaism. The TTJ rabbis put the key point in one sentence, with a single citation to authority: Throughout the centuries, loyalty to the

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[5] TTJ does not question the good faith of any of petitioner's amici. It is possible, for instance, to believe sincerely that the interests of a foreign state are (or happen to be) entirely consistent in all relevant respects with the interests of one's own, at least in certain circumstances.

country in which one lives has been a pillar of Jewish values. This is expressed in the words of the prophet Jeremiah: "Seek the welfare of the city to which I have exiled you." Jer. 29:7. Mindful of this teaching, Orthodox Jews pray for the welfare of the President and "all constituted officers" of the Government—every Sabbath morning, after the reading from the Prophets is concluded.

Even if taken only as a prudential warning, Jeremiah's counsel should ring especially true for Jews in the United States, which gives them the freedom to maintain and follow their religious principles. Accordingly, TTJ believes that, as U.S. citizens, Jews should not attempt to influence U.S. foreign policy to conform to any *outside* agenda they may have. Those who reject this counsel, and engage in lobbying for Israel, for instance, certainly do not speak for "Orthodox Jews," or Jews in general. Moreover, TTJ believes their efforts are counterproductive, for Jews here and also for Jews living in the Holy Land.[6]

The State of Israel, the Jewish People, and Some Dangerous Misconceptions

Lobbying for Israel, by Jews as Jews, is of immediate *practical* concern. In TTJ's view, Jews are endangered by the widespread misconception that (nearly) all Jews support the State of Israel, *whatever it may choose to do.* More specifically, TTJ sees Jewry worldwide as endangered by the

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[6] Of course, like other citizens, the TTJ rabbis have opinions of their own, and they have the constitutional right to express them—as by submitting an amicus brief in this Court.

misconception that "the Jews" in general favor Israel's territorial expansion, its rejection of territorial compromises, and all of its military operations.

These misconceptions do not come out of nowhere. The expansionist Zionists frequently declare, as does the Government of Israel, that the State of Israel is the state *of* "the Jewish people": the implicit (and false) corollary is that *whatever* is "good for Israel" (in its ruling coalition's eyes) *must* also be good for "the Jewish people." *See, e.g.*, Brief of American Jewish Committee at 1 ("Its mission is to enhance the well-being of Israel and the Jewish people worldwide").

Similarly, the expansionists might wrap the State of Israel and the Jewish people, Jerusalem and "Judaism," into one package, in a single sentence that would take paragraphs to unpack. *See* Brief of Zionist Organization of America at 2 ("All ZOA members appreciate the significance of Jerusalem to Israel and the Jewish people—it is Judaism's holiest city."). The effect is heightened by cleaving to rigid formulas on Jerusalem, insisting that the city must remain the exclusive capital of Israel, "united and undivided," *even if* a workable peace plan should be available, putting control of Jerusalem on an international-city or shared-sovereignty basis. *See id.* at 1 ("Jerusalem as Israel's eternal and undivided capital").

Candor in stating its interest brings TTJ to open one especially delicate subject. The expansionist Zionists sound the alarm at the rise of anti-Jewish sentiment abroad. Is it acceptable in this country's

current public discourse, which they have done so much to shape, to suggest that this problem might be *somehow* connected with the policies and actions of the State of Israel? Or even that something ugly here at home may be spawned by their own efforts to undermine and neutralize (or reverse) U.S. policy when *opposed by Israel* (as on expansion of the West Bank settlements)? Can one doubt that such conduct *might* trigger resentment, and dark imaginings of "control" by "the Jews"? History has its lessons. Yet the expansionists have boasted (sometimes openly) of their political influence, especially in Congress (whether or not their claims are well-founded).[7]

Should Any of This Matter to the Court?

By fleshing out its interest in this unorthodox way, TTJ hopes only to cancel out to some degree the background noise generated in this proceeding by a chorus of petitioner's Zionist and Zionist-oriented amici—on matters everyone ostensibly agrees are unrelated to the strictly *legal* issues. In their harmoniously ordered statements of interest, they ignore the existence of discordant facts and convictions. The inevitable upshot, whatever their intentions, is the distortion of a complex reality.

None of this should matter to the Court, assuming it can fairly decide the case in a vacuum,

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[7] See, *e.g.*, J. Goldberg, *Real Insiders*, THE NEW YORKER, July 4, 2005 (reporting a dinner conversation "several years" earlier with AIPAC's director of foreign-policy issues: "'You see this napkin?,' he said. 'In twenty-four hours, we could have the signatures of seventy senators on this napkin.'") *Available at* http://www.newyorker.com/magazine/2005/07/04/real-insiders.

hermetically sealed from contamination by history and politics.

The Legal Question

None of the political issues and historical events touched on above bears properly on the *legal* question, to be addressed in the Argument below. The Argument urges a disposition on narrow procedural grounds that do not require the Court (i) to enforce Section 214(d), contrary to the consistent line taken by the Presidents, or (ii) to hold the statute unconstitutional as trenching on Presidential power in foreign policy, or, more generally, (iii) to wade into political waters. This disposition is argued on a basis that has (apparently) not been raised or addressed by the parties heretofore.

SUMMARY OF ARGUMENT

The sole basis of petitioner's claim is that, although directed by Section 214(d) to do so, the Secretary of State did not record "Israel" as petitioner's birthplace on his passport (and other government documents). By this statutory violation, petitioner has suffered no cognizable "injury in fact," and therefore he cannot sustain his burden to show he has standing to sue.

First, petitioner's passport is not "his"; it belongs to the Government. He presumably has no cognizable interest in another person's property unless it is causing a nuisance.

Secondly, Section 214(d) confers no "right" on a Jerusalem-born citizen to have "Israel" shown on his passport as his birthplace, let alone a private right of action to secure this non-existent right. The statute merely provides that "Israel" should be recorded on request; the "request" requirement protects Jerusalem-born *non*-requesters who would not want "Israel" on their passports. Further, as appears from the enactment's context, including related subsections of the Act, Congress was not concerned with indulging the sentiments of Jerusalem-born citizens (it had a different agenda)—and in any event injury to such sentiments is not cognizable. Nor is what has been termed "ideological injury."

Third, what remains for petitioner to assert as "injury in fact" is the sheer statutory violation, without more. That violation (TTJ submits) does not satisfy the injury-in-fact requirement derived by this Court from Article III—notwithstanding a familiar reading of cases frequently cited to the contrary. This Court granted certiorari in an unrelated case to consider essentially the same general question, but then dismissed the writ after oral argument as "improvidently granted." Thus petitioner's case affords the Court an opportunity to revisit the issue, should it wish to do so.

ARGUMENT

Because the support of this amicus curiae for respondent is procedurally oblique, a short note on the threshold of the Argument may be useful to dispel any initial confusion.

TTJ supports respondent Kerry, Secretary of State, in urging dismissal of the action. Taking no position on the merits of the Secretary's own arguments, however, TTJ urges that the action be dismissed for failure to establish standing to sue—in particular, because petitioner cannot satisfy the injury-in-fact requirement for standing under Article III of the Constitution as interpreted by this Court. The general issue whether petitioner satisfied this requirement was raised in the district court, and decided in petitioner's favor in the Court of Appeals in the first appeal. *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C.C. 2006). Respondent did not pursue the issue further. But TTJ submits that the issue was wrongly decided. It now makes another (and rather different) injury-in-fact argument to this Court.[8]

I. To Satisfy the Injury-in-Fact Requirement, Petitioner Must Show That He Has Suffered Concrete Injury, Tangible and Palpable, by Invasion of a Legally-Protected Interest

Article III of the Constitution "confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.' § 2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing

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[8] "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994). The court at any stage must raise the issue *sua sponte* if it spots it. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990) (issue of standing raised *sua sponte* on appeal to Supreme Court).

to do so." *Hollingsworth v. Perry*, 570 U.S. __, 133 S.Ct. 2652, 2661 (2013).

This Court has identified "the irreducible constitutional minimum of standing," comprising three elements, of which only one comes into play here: "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . *concrete* and *particularized*." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).[9] *Accord Susan B. Anthony List. v. Driehaus*, 134 S.Ct. 2334, 2341-42 (2014); *Hollingsworth*, 570 U.S. __, 133 S.Ct. at 2661.

The requisite concrete and particularized injury must be "*tangible*," *Hollingsworth*, 133 S.Ct. at 2661, and it must be "distinct and *palpable*," *Gollust v. Mendel*, 501 U.S. 115, 126 (1991) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Of course it must also be an "injury" to begin with.

Most fundamentally, the requisite injury must involve "an *invasion of a legally protected interest*." *Lujan*, 504 U.S. at 560. This notion is so fundamental that its proper application is generally treated as self-evident, not as calling for discussion. See, *e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 212 (1995) ("Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest.").

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[9] Throughout, emphasis (*italics*) is added, and internal citations and internal quotation marks are generally omitted.

The party invoking federal jurisdiction bears the burden of establishing that he has suffered an "injury in fact." *Lujan*, 504 U.S. at 560. Petitioner is that party and bears that burden.

II. PETITIONER CANNOT SHOW HE HAS SUFFERED THE REQUISITE INJURY

Not complying with Section 214(d)'s directive, to record "Israel" as petitioner's birthplace on his passport (and certain other official documents), the Secretary wrote "Jerusalem" instead. That is the sole basis of petitioner's claim for injunctive and declaratory relief: he (by his guardian) filed this action to have "Jerusalem" replaced by "Israel." He alleges no other injury, such as economic or physical harm, or even the psychological harm that could conceivably flow from the wounding of his feelings as a Jerusalem-born U.S. citizen who, one imagines, might like to have an official U.S. document stating that he was born in Israel.

The Court of Appeals ruled that this statutory violation sufficed to establish petitioner's standing: "Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute." *Zivotofsky*, 444 F.3d at 618. Yet in this case—unlike, say, environmental-law cases, or cases under the Freedom of Information Act ("FOIA"), cited by the Court of Appeals—there is no express statutory right to sue. And the absence of injury other than the statutory violation itself is, as it were, palpable.

In other words, petitioner has not suffered a cognizable "injury in fact": no concrete injury, tangible and palpable—and also no "invasion of a legally protected interest."

Some reasons why petitioner's "injury" is not cognizable—why he lacks standing—are set out, informally and concisely, in a recent blog post by a well-known legal scholar. *See* E. Kontorovich, *Why the Jerusalem passport case should be dismissed for lack of standing*, WASHINGTON POST (The Volokh Conspiracy), Apr. 25, 2014, *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/25/why-the-jerusalem-passport-case-should-be-dismissed-for-lack-of-standing/ (last visited Sept. 22, 2014). Without apology, TTJ adopts Professor Kontorovich's argument substantially as stated,[10] and (unable to improve on his engaging prose) quotes him *in extenso.* He is not responsible for this use of his writing; and his views might even have changed since publication.[11]

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[10] Despite the blog post's unqualified title (possibly an editor's handiwork), Professor Kontorovich states that he "think[s] there is a reasonable argument" against Article III jurisdiction. Then he specifies it, with further qualification: "I think the argument for standing is thin–though I say this tentatively, as standing doctrine is notoriously inconsistent in its application and vague in its requirements."

[11] Note quite 90 days after presenting his argument against petitioner's standing, Professor Kontorovich surfaced in this proceeding on petitioner's side: the amicus curiae brief for one of petitioner's various platoons of amici lists him (1) among the "Amici law professors," and (2) as counsel (with a non-amicus practitioner as "counsel of record"). *See* Brief of LDB, et al. at 1-2, 31 (and cover).

A. Petitioner's Passport Is Not "His"

"To start with, the passport is not 'his.' Rather, as it says on page five of my passport, it is 'U.S GOVERNMENT PROPERTY . . . It must be surrendered upon demand made by an authorized representative of the United States.'"[12] *See* 22 C.F.R. § 51.7(a). "One generally does not have any legally cognizable interest in other people's property that is not causing a nuisance, even if one is allowed to carry it around."

The fact that petitioner has no property interest in his passport does not mean he has no rights with respect to it, of course. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (cancellation of passport implicates specific liberty interest, the right to travel internationally). But petitioner has not been disturbed in the use of his passport: he wants a federal court to order the Secretary to revise the passport to conform with the statutory directive. Especially since the passport is not even "his," it is hard to portray him as resisting "an invasion of a legally protected interest."

B. Section 214(d) Confers No "Right" and No Right of Action

"Of course, there is a statute involved, but it does not create a 'right,' let alone a cause of action, to have Israel listed on one's passport. Rather, it says that the State Department should *only* list 'Israel' as a birthplace if the passport-holder so requests. That

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[12] Text quotations not otherwise attributed are from the cited blog post.

is, if anything, more about the rights of non-requesters" who would not want "Israel" on *their* passports, "or about the bureaucratic process for making passports. Oddly, the Court of Appeals, in reversing the standing dismissal, analogized the injury to denials of Freedom of Information Act requests. FOIA, however, specifically creates a detailed cause of action, which the passport measure does not." *See Zivotofsky*, 444 F.3d at 618-619 (citing FOIA and cases).

It is important to distinguish between two related points. Section 214(d) does not confer a "right" on a Jerusalem-born U.S. citizen to have "Israel" shown on his passport. And there is no implied private right of action under Section 214(d) to secure this non-existent right by suing in federal court.

"There is no 'injury' to Zivotofsky; he has not been deprived of any legal entitlement. Indeed, Congress's law, given its context, was not about making American citizens [born] in Jerusalem feel good, even if such a sentiment could give rise to an Art. III injury, which I doubt." Research discloses no case in which this Court has held that sentiments or wounded feelings related to a statutory violation amount to cognizable injury. *Cf. Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972) (holding that plaintiff lacked standing, but acknowledging that "change in the aesthetics and ecology" of a national park "may amount to an 'injury in fact'" and that "particular environmental interests" may be "deserving of legal protection through the judicial process").

The immediate objective "context" of Section 214(d) of the Act includes not only the familiar history of the legislative effort but the three preceding subsections of Section 214: 214(a) through 214(c). All are related to the goal of U.S. treatment or recognition of Jerusalem as "capital" of Israel. And Section 214(d) moves toward that goal too, by treating Jerusalem as part of Israel's territory, just as the State of Israel does.

"Imagine a government form that asked those filling it out to indicate if they were white, black or hispanic. Subsequently, in compiling this information, the government chooses to lump hispanics in with whites. I do not think the mere fact that . . . hispanics were involved in filling out the forms would give them standing to challenge what the government does with the information. *The passport issue is also one about how the government classifies information* provided by individuals."

At bottom, petitioner "is using the contents of his passport *to litigate an ideological injury*": "Such policies [as "the Executive's" policy "of not saying Jerusalem is in Israel"] affect not just the plaintiff, but the entire nation. Indeed, it affects him in ways not differentiable from [those of] the U.S. as [a] whole, whose passport it is." But injuries that are "not differentiable" from those of the nation, or of the public at large, clearly cannot satisfy the injury-in-fact requirement. As the Court held in *Lujan,* "the public interest in the proper administration of the laws . . . cannot be converted into an individual right by a statute that denominates it as such." 504 U.S. at 576-77. *A fortiori* this is true where, as here, no

"individual right" is "denominate[d]" by the statute "as such," or as anything at all. (The merits of the Executive's policy are beside the point, and beyond this Argument's scope.)

Certain of petitioner's amici, in stating their respective "interests," appear to suggest that petitioner suffered an "injury"; but their own words cut against this suggestion: their evident difficulty in articulating a *relevant* interest tends to show that the supposed injury has no concrete content (it's vacuous), or is self-inflicted (it's invented), or really has nothing to do with the statute. A few of the assertions of those amici, with short retorts, will make the point:

American Jewish Committee ("AJC"): "[T]he statute upholds the dignity of United States citizens born in Jerusalem who wish to identify Israel as their nation of birth" (Brief of AJC at 1). These citizens don't need this statute (or its enforcement) to do so: they are free to "identify Israel as their nation of birth" without government assistance.

Association of Proud American Citizens Born in Jerusalem, Israel ("an ad hoc, web-based organization"): They describe themselves as "Jerusalem-born American citizens who wish to self-identify as U.S. citizens born in Israel" (Brief of ADL, et al. at 2). Ditto.

International Association of Jewish Lawyers and Jurists ("IAJL"): The statute "does nothing more than allow U.S. citizens born in Jerusalem to express their own view on the issue by choosing how to describe their place of birth in their passport" (Brief of IAJL at 2). It's not "their" passport—and

"expressing their own view" on a paper that is the property of the U.S. Government is not the proper subject of the statute.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism: They have a commitment "to uphold the right of a U.S. citizen to identify the country in which he or she was born," a "right that must extend to American citizens born in Jerusalem" (Brief of ADL, et al. at 4). That "right" remains unimpaired even if the directive of Section 214(d) is not enforced by judicial decree.

Union of Orthodox Jewish Congregations of America: "There are few issues of higher *symbolic value* to the Orthodox Jewish community than the centrality of Jerusalem, toward which the community's many members turn thrice daily to face in prayer") (Brief of ADL, et al. at 4). Noncompliance with the statutory directive can scarcely depreciate the "symbolic value," or undermine the religious practice, which obviously has nothing to do with passports or what's recorded on them.

C. The Sheer Statutory Violation Does Not Constitute "Injury in Fact"

Logically, petitioner's last-ditch proposition is this: the injury-in-fact requirement is satisfied by the sheer statutory violation, *without more*. But even a cursory inspection of the leading cases does not support such a "naked-violation" rule, so petitioner should be held to lack standing on this score too. At best (for petitioner), it is an open question whether the naked-violation rule is the current rule of law: it is certainly a question that the Court recently

declined to decide in another case, and could now take up here.

In holding that petitioner had standing (*Zivotofsky*, 444 F.3d at 617), the Court of Appeals relied primarily on two cases from the 1970s for the supposed naked-violation rule, which it seemed to embrace: (1) *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); (2) *Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."). In both of these cases, however, the pronouncement on standing quoted by the Court of Appeals was unquestionably dictum: in neither case was it necessary to the holding, since the Supreme Court held in both that the plaintiff before it did not have standing. *See Linda R.S.*, 410 U.S. at 617-618; *Warth*, 422 U.S. at 514. Even *this* Court's obiter dicta are not properly taken as controlling precedents—and least of all in this Court.

The Court took a closer look at the supposed naked-violation rule in *Lujan*. Denying standing once again (504 U.S. at 578), the Court left undisturbed the broad dictum in *Linda R.S.*, declaring: "Nothing in [the ruling] contradicts the principle [stated in *Linda R.S.*] that 'the . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" To show that there was no contradiction with this

dictum ("principle"), the Court considered the precedents relied on in *Linda R.S.* and distinguished them (*ibid.*): "Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries *concrete, de facto injuries that were previously inadequate in law* (namely, injury to an individual's personal interest in living in a racially integrated community, *see Trafficante v. Metropolitan Life. Ins. Co.*, 409 U.S. 205, 208-212 (1972), and injury to a company's interest in marketing its product free from competition, *see Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968))." And it is one thing to broaden categories of injury by statute, for standing purposes, another to "'abandon[] the requirement that the party seeking review must himself have suffered an injury.'" 504 U.S. at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

In short, the sheer statutory violation is not sufficient: there is always something more required for "injury in fact," perhaps a wrong "previously inadequate in law." Petitioner clearly suffered no such wrong. He has nothing more than a statutory violation to allege, and so he suffered no injury cognizable in federal court.

At best, from petitioner's viewpoint, it is an arguably open question whether a statutory violation without more suffices in general for "injury in fact." This was essentially the question on which the Court granted certiorari in *First American Financial Corp. v. Edwards*, 131 S.Ct. 3022 (2011). There the specific question was whether a plaintiff has standing to challenge a violation of the Real Estate Settlement

Procedures Act ("RESPA"), absent an allegation that the alleged violation resulted in an overcharge—*i.e.*, with nothing more than the sheer violation of RESPA. After briefing and oral argument, however, the Court dismissed the writ as "improvidently granted." *First American Financial Corp. v. Edwards*, 132 S.Ct. 2536 (2012).

The Court could revisit this issue in the present case, if disposed to do so. TTJ takes no position on this option.

CONCLUSION

For the foregoing reasons, the case should be dismissed for lack of standing. Accordingly, the judgment below should be vacated and the case remanded with instructions to enter an order of dismissal.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-628

In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
BY HIS PARENTS AND GUARDIANS,
ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,
Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONER

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In the Supreme Court of the United States

No. 13–628

MENACHEM BINYAMIN ZIVOTOFSKY,
BY HIS PARENTS AND GUARDIANS,
ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,
Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS

This case presents the question whether a law enacted by Congress regulating the "place of birth" designation on U.S. passports and consular birth reports is unconstitutional because it transgresses the recognition power of the President. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002), allows U.S. citizens born in Jerusalem to elect to list the birthplace on their passports and Consular Reports of Birth Abroad as "Israel" in place of "Jerusalem," as currently required by Department of State policy. The Executive has refused

to implement this law and challenges its constitutionality in this case.

The Executive's position places in issue the powers and responsibilities of the Congress under the Constitution. The Senate has a strong interest in defending its plenary authority to legislate in the areas of foreign commerce and naturalization against the Executive's claim of intrusion into the power over recognition of foreign governments. The Senate appears as amicus curiae to present its views that section 214(d) is a constitutional exercise of Congress' power to regulate passports that does not implicate, let alone intrude upon, the Executive's exercise of the recognition power.[1]

SUMMARY OF ARGUMENT

1. In 2002, Congress exercised its legislative powers over foreign commerce and naturalization to enact a statute providing U.S. citizens born in Jerusalem with the option of listing Israel, instead of Jerusalem, as the "place of birth" on their passports and consular birth reports. Pub. L. No. 107-228,

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[1] This appearance is undertaken pursuant to S. Res. 504, 113th Cong. (2014), 160 Cong. Rec. S4559 (daily ed. July 16, 2014), directing the Senate Legal Counsel to appear in the name of the Senate as amicus curiae under 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). This brief is submitted in accordance with Supreme Court Rule 37.4, which provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative."

§ 214(d), 116 Stat. 1350, 1366. The Executive has refused to comply with this law, claiming that it infringes on the President's constitutional power to recognize foreign governments by deviating from the State Department's present policy to list only the city (Jerusalem), and not any country, as the birthplace on passports of U.S. citizens born in Jerusalem.

"When the President takes measures incompatible with the expressed or implied will of Congress," as here, "his power is at its lowest ebb," and his actions "must be scrutinized with caution" and sustained only if Congress has intruded into a constitutional power of the Executive's wholly "disabling the Congress from acting upon the subject." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring). The Executive's action cannot survive such scrutiny as Congress enacted section 214(d) pursuant to its legislative passport power and that statutory provision does not infringe on the Executive's power of recognition.

2. Section 214(d) is a valid exercise of Congress' legislative passport power. From the earliest days under the Constitution, Congress has enacted legislation governing passport issuance under its powers "To regulate Commerce with foreign Nations" and "To establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cls. 3, 4. This Court has recognized Congress' plenary authority over passports. *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Haig v. Agee*, 453 U.S. 280 (1981). As these cases recognize, the Executive's exercise of authority over passports is based on congressional authorization. Therefore, Congress may

legislatively control the issuance and content of passports. *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("[L]egislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it.").

3. Section 214(d) does not intrude on the recognition power as it does not effectuate recognition of any sovereign or its territory, nor affect any of the consequences of recognition regarding sovereignty over Jerusalem.

Allowing citizens born in Jerusalem to list "Israel" as their place of birth does not "recognize" Israel's sovereignty over Jerusalem because the birthplace designation is not an act of foreign recognition, but a mechanism for identifying the passport holder. As this Court has explained, the modern passport serves largely as a "travel control document," and, in that role, "is both a proof of identity and proof of allegiance to the United States." *Haig*, 453 U.S. at 293. Including the passport holder's birthplace serves this identification function, as the State Department has acknowledged: "[The place of birth] entry is included to assist in identifying the individual, not the individual's nationality. The passport very clearly states that the bearer is a United States national or citizen." 7 Foreign Affairs Manual (FAM) 1310(g)(2), App. D.[2]

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[2] Since the filing of this lawsuit, the State Department has revised the Foreign Affairs Manual (FAM) provisions regarding the place-of-birth designation of U.S. citizens born in Israel, Jerusalem, and the West Bank and Gaza Strip, but has indicated that "[t]hose revisions made no change in policy." Brief of Respondent in Opposition at 4 n.2. This amicus brief cites to the current version of the FAM, available at http://www.state.gov/m/a/dir/regs/fam. Where applicable, citation is also provided to the related provision in the 1987 version of

The State Department's flexible policies regarding how citizens born abroad generally may choose to list their birthplace in passports and birth reports reflect that the "place of birth" listing on passports serves as a method of identifying the passport holder, and not as a statement of recognition by the U.S. Government. The Department allows individuals born abroad who "object[] to listing a country that currently has sovereignty over the actual place of birth" to choose to list their city of birth in the passport in lieu of the country. 7 FAM 1310(f), (g)(5), 1380(a), App. D (7 FAM 1383.6 (1987), JA 114). Allowing alternative listings for the same birthplace—to accommodate the objection of the passport holder—belies the Executive's view that the "place of birth" listing in the passport is necessarily an act of recognition, for, if it were so, only the recognized sovereign nation would be listed in every instance, and not cities as presently allowed.

The Department's policies regarding the "place of birth" listing for citizens born in Israel and surrounding areas (but not in Jerusalem) similarly refute the Executive's claim that the "place of birth" designation implicates the recognition of sovereignty over Jerusalem. While the United States does not recognize a foreign state of "Palestine," U.S. citizens born in the West Bank and Gaza Strip before May 14, 1948 may elect to list their place of birth either as "Palestine," or as "West Bank" or "Gaza Strip." 7 FAM 1360(c), (d), App. D (7 FAM 1383.5-5 (1987), JA 112-13). Likewise, U.S. citizens

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the FAM in effect at the time this suit was filed. Relevant provisions of the 1987 version are included in the Joint Appendix at 109-159.

born before May 14, 1948, in a location outside Jerusalem's then-municipal limits, but since annexed into the city, may also elect to list "Palestine" as their place of birth, despite the fact that they were born in present-day Jerusalem. 7 FAM 1360(f), (h), App. D (7 FAM 1383.5-6 (1987), JA 113). Permitting varied, and potentially confusing, birthplace listings in passports undermines the Executive's claim that adhering to section 214(d) would constitute recognition of Israel's sovereignty over Jerusalem.

4. Nor does section 214(d) affect any of the legal consequences of recognition. Recognition of a foreign state is:

> formal acknowledgment that the entity possesses the qualifications for statehood, and implies a commitment to treat that entity as a state. . . . Recognition of a [foreign] government is formal acknowledgement that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state.

Restatement (Third) of the Foreign Relations Law of the United States § 203 comment a. Recognition confers certain benefits on that sovereign, such as permitting it to "maintain a suit in a United States court, assert the sovereign immunity defense . . . and benefit from the 'act of state' doctrine" that precludes the courts of one country from sitting in judgment on the acts of the government of another country within its own territory. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 205 (D.C. Cir. 2013) (internal citations omitted); *see Banco Nacional v. Sabbatino*, 376 U.S. 398, 408-09

(1964); *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 359 (1955); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938).

Allowing U.S. citizens born in Jerusalem to elect to list their place of birth as "Israel" on passports and birth reports does not affect any consequences of formal recognition of the status of Jerusalem. It does not change how U.S. courts treat Israel or Jerusalem in legal matters. It does not determine the status of any sovereign property. It does not alter the treatment of the judgments of the local courts in Jerusalem by U.S. courts. It does not affect the immunity of any sovereign in U.S. courts. It does not require the President to receive ambassadors from, or send ambassadors to, any country, nor to confer any benefits that flow from recognition regarding Jerusalem or its relationship to Israel. In short, section 214(d) does not affect the position of the United States, as expounded by the President, regarding recognition of sovereignty over Jerusalem, nor carry any of the legal consequences of recognition. Accordingly, section 214(d) does not infringe on the recognition power or otherwise "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977).

5. The court of appeals erred in concluding that Congress' exercise of its legislative passport power impermissibly intrudes on the recognition power because of the President's concern that section 214(d) could cause "adverse foreign policy consequences." *Zivotofsky*, 725 F.3d at 219-20. That conclusion mistakenly conflates the recognition power with the Executive's role in carrying out the Nation's foreign policy generally.

The Executive and Congress share constitutional responsibility over foreign affairs. Congress exercises legislative authority in numerous areas significantly affecting foreign affairs, including appropriating funds, regulating foreign commerce, imposing customs duties and tariffs, declaring war, and raising and supporting the Nation's military forces. In addition, the Senate ratifies treaties and provides advice and consent to the appointment of ambassadors and other public ministers and consuls. Obviously, legislation and Senate action in these areas may have profound "foreign policy consequences." *Id.* at 219. It is equally clear that the specter of adverse consequences does not render such legislative action unconstitutional. By striking down section 214(d) because the Executive believes the provision has harmful foreign policy consequences, the court of appeals improperly constricted Congress' legitimate exercise of legislative authority.

The court of appeals also abdicated judicial oversight of Executive action. Having linked exercise of the recognition power to effects on foreign policy, the court accepted as "conclusive" the Executive's "view" that section 214(d) would "cause adverse foreign policy consequences," because the Judiciary is "not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d)." *Id.* at 219-20. Hence, under the court's reasoning, section 214(d)'s constitutionality is entirely dependent on the Executive's view of the statute's effect on foreign policy, effectively—and improperly—ceding to that Branch the courts' responsibility to decide the constitutionality of congressional enactments. *Zivotofsky v. Clinton*, 132 S. Ct. 1421,

1428 (2012). Indeed, hinging the constitutionality of section 214(d) on the Executive's effectively unreviewable assessment of the statute's foreign policy consequences essentially transforms the issue into a non-justiciable political question committed to the Executive—a conclusion this Court expressly rejected when this case was last before it. *Id.* ("[T]here is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute."). Consistent with that prior decision, the Court should reject the Executive's claim that it may decline to follow section 214(d) because of its assertion that the provision may cause adverse foreign policy consequences.

ARGUMENT

In this case, the Executive claims inherent constitutional authority to disregard a law enacted in the exercise of Congress' legislative authority over the contents of U.S. passports and Consular Reports of Birth Abroad. In 2002, Congress enacted legislation directing how "place of birth" may be listed on passports and birth reports for U.S. citizens born in Jerusalem, pursuant to Congress' authority to regulate foreign commerce and to establish a "uniform Rule of Naturalization." U.S. Const. art. I. § 8, cls. 3, 4; Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002). The Executive has refused to comply with this law because, it claims, a law permitting U.S. citizens to exercise a personal prerogative over the listing of their place of birth on their passports infringes on the exclusive power of the President to recognize foreign governments.

As the Executive's action directly contravenes the clearly expressed will of Congress in section 214(d), "Justice Jackson's familiar tripartite scheme" in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), "provides the accepted framework for evaluating executive action in this area." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). Justice Jackson explained:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring).

Congress, pursuant to its constitutional power to regulate passports, has expressly legislated here—allowing citizens born in Jerusalem the option to list "Israel" as the place of birth on their passports and consular birth reports—and the Executive has declined to comply with that law. Under such circumstances, the President's power is "in the least favorable of possible constitutional postures," and the Court "can sustain the President only by holding that [the place-of-birth specification on U.S. passports] is within his domain and beyond control of Congress." *Id.* at 640. The Executive's action contrary to the requirements of section 214(d) can be sustained only if Congress has intruded into a constitutional power of the Executive's wholly "disabling the Congress from acting upon the subject."

Id. at 637-38. Because such a claim of exclusive Executive power is "at once so conclusive and preclusive" over the other branches, it "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.*

The Executive's action here cannot survive such scrutiny. Congress enacted section 214(d) pursuant to its well-established power over passports. Congress has neither usurped, nor prevented the President from exercising, authority to recognize the territory of foreign sovereigns. Therefore, section 214(d) is a constitutional exercise of Congress' legislative passport power that does not intrude on the recognition power, and the Executive is obliged to comply with its terms.[3]

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[3] In striking down section 214(d), the court of appeals held that the recognition power is exclusively the President's. *Zivotofsky*, 725 F.3d at 205-14. As Judge Tatel recognized, *id.* at 222 (Tatel, J., concurring), this Court has never had occasion to decide whether that power is the President's alone or shared with Congress. No prior case addressing recognition entailed a dispute between the President and Congress, where the President's power is at "its lowest ebb." *Youngstown*, 343 U.S. at 637; *see Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839); *United States v. Belmont*, 301 U.S. 324 (1937); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); *United States v. Pink*, 315 U.S. 203 (1942); *Banco Nacional v. Sabbatino*, 376 U.S. 398 (1964); Recent Case, *Zivotofsky v. Sec'y of State, 725 F.3d 197 (D.C. Cir. 2013)*, 127 Harv. L. Rev. 2154, 2161 (2014).

While the Court need not, and should not, address the issue here, the Senate agrees with Petitioner that Congress shares the recognition power. Brief of Petitioner at 27-57. "Careful examination of the textual, structural, and historical evidence," *Zivotofsky*, 132 S. Ct. at 1430, supports this conclusion. The Constitution's text grants the Executive no exclusive

Continued

power over recognition. As Hamilton noted at the Framing, the clause directing the President to "receive Ambassadors and other public Ministers," U.S. Const. art. II, § 3, which the Executive relies on as the supposed source of exclusive power, is "more a matter of dignity than of authority" and "will be without consequence in the administration of the government." The Federalist No. 69.

Nor does the Constitution's structure support a claim of exclusive Presidential power over recognition. The Constitution divides between the President and the Senate key roles in foreign policy decision-making. *See, e.g.*, U.S. Const. art. II, § 2, cl. 2 (treaty power and appointment of ambassadors). Granting exclusive power over recognition to the President "would have been contrary to both the constitutional design for collective decisionmaking in the formulation of foreign policy and the Framers' determination to place the primary responsibility for the conduct of foreign relations"—the treatymaking power—in the hands of "the president and the Senate." David Gray Adler, *The President's Recognition Power* in *The Constitution and the Conduct of American Foreign Policy*, 135, 148-49 (David Gray Adler & Larry N. George eds., 1996). "The constitutional structure of checks and balances does not support an exclusive (and uncheckable) recognition power in the Executive." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 58 (2013).

Finally, historical practice does not support an exclusive presidential recognition power. As a leading scholar recently found after an exhaustive survey of post-ratification historical practice, history "provides little support for any claim of an exclusive recognition power. The weight of the evidence contradicts such a claim of exclusive executive power. . " *Id.* at 8; *see id.* at 9-50 (historical record reflects that Congress and President have shared in recognition actions).

Nevertheless, the Court need not reach—and should not address—that broad question in this case. Section 214(d) neither infringes on, nor is an exercise of, the recognition power. Therefore, "[t]his case does not require the Judiciary to decide whether the power to recognize foreign governments and the extent of their territory is conferred exclusively on the President or is shared with Congress." *Zivotofsky*, 132 S. Ct. at 1436 (Alito, J., concurring). Where Congress has not exercised

I. CONGRESS HAS LONG LEGISLATED OVER PASSPORTS UNDER ITS PLENARY AUTHORITY TO REGULATE FOREIGN COMMERCE AND TO ESTABLISH RULES FOR NATURALIZATION

A. The Constitution grants Congress the power "To regulate Commerce with foreign Nations" and "To establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cls. 3, 4; *see Demore v. Kim*, 538 U.S. 510, 521 (2003) (Congress has "broad power over naturalization and immigration") (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)). Pursuant to these powers, Congress has enacted legislation governing the issuance of passports from the earliest days under the Constitution. In 1803, Congress made it a crime for a consul or commercial agent of the United States knowingly to grant a passport to an alien. *See* Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 203, 205. During the War of 1812, Congress prohibited U.S. citizens from crossing into any territory "belonging to the enemy" without "a passport first obtained from the Secretary of State" or other specified federal or state official. Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 195, 199.

Congress broadly regulated passport issuance in 1856. Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60. Congress authorized the Secretary of State "to grant and issue passports" and to authorize the issuance of passports by U.S. diplomatic or consular officers in foreign countries, "under such rules as

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the recognition power nor attempted to overturn the Executive's exercise of that power, the Court should not reach out to decide the unresolved question whether the recognition power is the President's alone or shared with Congress.

the President shall designate and prescribe for and on behalf of the United States." *Id.* The Act forbade anyone other than the designated federal officials from issuing passports and continued the prohibition against knowingly granting passports to aliens. *Id.*[4]

In 1917, Congress mandated that persons seeking passports submit a written application under oath and made it a crime knowingly to make a false statement in a passport application, to use a passport issued to another person, to violate the restrictions in a passport, or to forge, counterfeit, or alter passports. Act of June 15, 1917, Pub. L. No. 65-24, Title IX, §§ 1-4, 40 Stat. 227. Three years later, Congress increased passport fees and modified the period for which passports were valid. Act of June 4, 1920, Pub. L. No. 66-238 §§ 1-3, 41 Stat. 750-51.

Congress overhauled the passport laws in 1926. Act of July 3, 1926, Pub. L. No. 69-493, 44 Stat. 887 ["Passport Act of 1926"]. Using essentially identical language as in the 1856 law, the Passport Act of 1926 authorized the Secretary of State to "grant and issue passports" and to cause such passports to be issued in foreign countries by diplomatic and consular representatives, "under such rules as the

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[4] Prior to this law, "various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law." *Kent v. Dulles*, 357 U.S. 116, 123 (1958). The 1856 Act "put an end to those practices." *Id.* It also prohibited imposing "any charge for granting, issuing, or verifying any passport except in a foreign country," where it permitted a fee of no more than $1. Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. at 60.

President shall designate and prescribe for and on behalf of the United States." *Id.* § 1. The Act continued the prohibition against anyone other than the designated federal officials granting, issuing, or verifying passports and limited the validity of passports to two years, subject to one renewal. *Id.* §§ 1-2.

Although Congress has modified the provisions of the Passport Act of 1926 over time, that statute remains the basis for the Executive's authority to issue passports. Indeed, section 1 of the Act—authorizing the Secretary to grant passports—has been amended only twice. In 1978, Congress prohibited the Executive from issuing passports that are "restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." Foreign Relations Authorization Act, FY 1979, Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978). And twenty years ago, Congress modified the universe of officials who could issue passports.[5]

Accordingly, from early in the Nation's history, Congress has exercised its power to regulate the manner in which the Executive issues passports, including restricting which officials can grant pass-

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[5] Pub. L. No. 103-236, § 127, 108 Stat. 382, 394 (1994), *as amended by* Pub. L. No. 103-415, § 1(b), 108 Stat. 4299 (1994). Over time, Congress has modified other provisions of the 1926 Passport Act, including by raising fees and lengthening the period of validity. *See, e.g.*, Pub. L. No. 71-488, 46 Stat. 839 (1930); Pub. L. No. 72-136, 47 Stat. 157 (1932); Pub. L. No. 86-267, 73 Stat. 552 (1959); Pub. L. No. 90-428, 82 Stat. 446 (1968).

ports, requiring that passport applications be written and submitted under oath, establishing the period passports remain valid, setting the passport fee, and criminalizing the creation or use of fraudulent passports. This longstanding, unchallenged legislative direction of the Executive affirms Congress' plenary authority to regulate issuance of passports. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.") (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

B. The Court has consistently recognized Congress' plenary authority over passports and looked to Congress' legislative direction and delegation of authority to the Executive to delimit the scope of the proper exercise of the Executive's duties. In so doing, the Court has not relied on any inherent constitutional authority of the Executive, but has treated the Executive's administration of passport responsibilities as derived from and bound by Congress' legislative enactments, invalidating Executive action when not traceable to authority granted by Congress.

In *Kent v. Dulles*, 357 U.S. 116 (1958), two U.S. citizens sued the Secretary of State after he denied them passports on the ground that they were members of the Communist Party. The citizens claimed that the State Department's regulation prohibiting the issuance of passports to Communist Party members was not authorized by the Passport Act of 1926. The Court held that the Secretary lacked authority under the Passport Act to deny passports on

that ground. *Id.* at 129-30. In reaching this conclusion, the Court considered whether the discretion Congress granted the Secretary of State to "issue passports . . . under such rules as the President shall designate and prescribe," Passport Act of 1926, § 1, 44 Stat. 887, authorized denying passports on the basis of Communist Party membership. The Court found that this ground was not one of the bases for denying passports "which it could fairly be argued were adopted by Congress" based on prior administrative practice at the time Congress enacted the Passport Act of 1926. *Kent*, 357 U.S. at 128. Accordingly, the Court held that the Passport Act of 1926 did not authorize the Secretary to deny passports to citizens based on Communist Party membership. Absent such authorization, the Court reasoned, the Secretary could not withhold passports on that ground. The Court did not mention even the possibility that inherent presidential power might provide a basis for denying passports in the absence of congressional authorization.

This Court has since twice sustained the Secretary's actions regarding passports. In both cases, the Court looked solely to whether the Secretary's actions were authorized by Congress in the Passport Act of 1926. In *Zemel v. Rusk*, 381 U.S. 1 (1965), following the breaking of U.S. diplomatic relations with Cuba, the Court upheld the State Department's imposition of a requirement that the Secretary specifically endorse passports to be valid for travel to Cuba. Zemel, a U.S. citizen, sued to challenge the denial of his request to validate his passport for travel to Cuba, arguing that the Secretary lacked authority to restrict passports for such travel. *Id.* at 3-4. Focusing on the statutory

question whether Congress had authorized the Secretary to restrict passports for travel to Cuba, the Court found that Congress had implicitly approved the Executive's authority to impose area restrictions in passports when it enacted the Passport Act of 1926:

> The use in the 1926 Act of language broad enough to permit executive imposition of area restrictions, after the Executive had several times in the recent past openly asserted the power to impose such restrictions under predecessor statutes containing substantially the same language, supports the conclusion that Congress intended in 1926 to maintain in the Executive the authority to make such restrictions.

Id. at 9.

The Court again relied on Congress' exercise of its legislative passport authority in *Haig v. Agee*, 453 U.S. 280, 283-84 (1981), to sustain the Secretary's revocation of the passport of Agee, a citizen engaged in a "campaign" to expose CIA personnel operating under cover in foreign countries. The Secretary had revoked Agee's passport, relying on regulations authorizing denial or revocation where a passport holder's "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." *Id.* at 286, 299-300. Agee challenged the revocation asserting, *inter alia,* that Congress had not authorized revocation of passports on that basis. *Id.* at 287. In upholding the Secretary's action, the Court noted that the Executive had long construed the passport laws to authorize it to withhold passports for reasons of national security or foreign policy. *Id.*

at 299-301. As in *Zemel*, the Court found that Congress' amending of the passport laws, aware of the Executive's "longstanding and officially promulgated view," constituted "weighty evidence of congressional approval of the Secretary's interpretation" that the statute authorized denying or revoking passports on national security grounds. *Id.* at 301. The Court upheld the Executive's action not because of the President's independent constitutional power over foreign relations, which the Court did not rely on, *see id.* at 289 n.17, but because Congress had legislatively authorized revocation of passports on those grounds.

Thus, this Court has recognized that Congress possesses plenary legislative authority over passport issuance and that the Executive's exercise of authority in the passport area is derived from, and based on, authorization granted by Congress. Executive action under such "legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). As the Court's analysis in *Kent v. Dulles* and the subsequent passport cases illustrates, "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U.S. 288, 309 (1944). Thus, having authorized the Secretary of State to issue passports pursuant to its legislative powers over foreign commerce and naturalization, Congress may control how passports are issued and what information they contain. The Secretary, in acting pursuant to the authority Congress has granted him to issue passports, must comply with

Congress' direction in exercising that authority, unless Congress has intruded into a constitutional power of the President's wholly "disabling the Congress from acting upon the subject." *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

II. SECTION 214(d) DOES NOT INTRUDE ON THE RECOGNITION POWER

This Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977). In determining whether an Act of Congress "disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.*; *see also Morrison v. Olson*, 487 U.S. 654, 695 (1988). Section 214(d) usurps no constitutional power of the Executive over recognizing foreign governments. In enacting section 214(d), Congress has neither exercised the power of recognition, nor "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions" of recognition, *Nixon*, 433 U.S. at 443, regarding the official position of the United States on sovereignty over Jerusalem.

A. Section 214(d) Is Not an Act of Recognition of Foreign Governments or Their Sovereign Territory.

The court of appeals held that section 214(d), "by attempting to alter the State Department's treatment of passport applicants born in Jerusalem, . . . directly contradicts a carefully considered exercise of the Executive branch's recognition

power." *Zivotofsky*, 725 F.3d at 217. The court erred in ruling that providing U.S. citizens with an option for identifying their place of birth in passports and consular birth reports constitutes an act of recognition of foreign governments by the United States. The nature of the modern passport, the purpose of "place of birth" information in the passport, and the State Department's policies providing U.S. citizens born abroad with options in identifying their birthplace in passports demonstrate that birthplace information serves solely to identify the passport bearer and not to recognize sovereign governments or their territory.

1. Traditionally, a passport had been considered "a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Haig*, 453 U.S. at 292 (citing 3 G. Hackworth, Digest of International Law § 268, at 499 (1942)). As this Court explained in 1835:

> [The passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.

Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692, 698 (1835).

As more American citizens began to travel abroad and use of passports became more wide-

spread,[6] however, their function shifted, such that, "for present purposes," a passport serves mostly as a "travel control document," and, in that role, "a passport is both proof of identity and proof of allegiance to the United States." *Haig*, 453 U.S. at 293; *see* Craig Robertson, *The Passport in America: the History of a Document* 11 (2010) (role of passport has changed "from something like a letter of introduction to a certificate of citizenship to an identification document").

Listing the place of birth serves the identification function of the modern passport; it does not make a statement of recognition on the part of the U.S. Government. Including birthplace information in passports "developed over time as a matter of international custom and use" and was first required by the United States in the 1920s. U.S. General Accounting Office Report to Congress, GAO/NSIAD-87-201, "Passports: Implications of Deleting the Birthplace in U.S. Passports" 6 (August 1987) *available at* http://www.gao.gov/products/NSIAD-87-201. "Governments use this and other information—such as name, nationality, and birth date contained in passport documents—to verify an individual's identity." *Id.*

The State Department itself has recognized that birthplace information is included in the passport for identification purposes only. As the Depart-

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[6] For much of U.S. history, passports were not required to travel outside the United States, at least in times of peace. That changed in modern times, as passports became required for foreign travel to more nations even in peacetime. In 1978, Congress required passports at all times for travel to and from the United States, with few exceptions. *See Haig*, 453 U.S. at 293 n.22.

ment's current Foreign Affairs Manual states: "[The place of birth] entry is included to assist in identifying the individual, not the individual's nationality. The passport very clearly states that the bearer is a United States national or citizen." 7 FAM 1310(g)(2), App. D. In responding to interrogatories in this case, the Department confirmed that identification is the sole purpose served by the "place of birth" specification:

> The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case tracking system.[7]

Thus, the Department itself recognizes that the "place of birth" entry in a passport serves to aid in identifying the passport bearer; it is not an instrument for recognizing foreign sovereignty.

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[7] JA 70 (Defendant's Responses to Plaintiff's Interrogatories #16). A State Department official confirmed in testimony that the "place of birth" specification serves identification purposes and identified no other reason for its inclusion. JA 78-79 (Tr. of Deposition of Catherine Barry, Dep. Ass't Sec'y for Overseas Services, U.S. Dep't of State).

2. The Department's flexible policies regarding how citizens born abroad may choose to list their birthplace in passports and birth reports further reflect that the birthplace serves as a manner of personal identification of the holder of the passport and not as a statement of recognition by the U.S. Government. The Department allows individuals born abroad who "object[] to listing a country that currently has sovereignty over the actual place of birth" to choose to list their city of birth in the passport in lieu of the country. 7 FAM 1310(f), (g)(5), 1380(a), App. D (7 FAM 1383.6 (1987), JA 114).[8] This policy permits citizens to express their "object[ion]" to the nation recognized by the U.S. Government as having sovereignty over their birthplace by choosing to omit the name of that nation from their passport. Allowing citizens born all over the world such individual choice in listing their birthplace—based on their personal objection to listing the sovereign recognized by the United States—is incompatible with the Executive's claim that the "place of birth" listing implicates the Government's recognition of foreign sovereigns.

The Department's policies regarding the "place of birth" listing for citizens born in Israel and surrounding areas (but not in Jerusalem) similarly undermine its claim that the "place of birth" designation implicates the U.S. Government's recognition of sovereignty over Jerusalem. While the United States does not recognize a foreign state of "Palestine," and the Executive's position is that such

[8] Absent exercise of this personal option, the "place of birth" listed on a passport is "the country that currently has sovereignty over the actual place of birth." 7 FAM 1330, App. D (7 FAM 1383.1, 1383.4(b) (1987), JA 109-10).

recognition (like the status of Jerusalem) depends on the outcome of final status negotiations between the Palestinians and Israel, *see* Remarks by Ambassador Susan E. Rice, U.S. Perm. Rep. to the United Nations, at the U.N. Security Council (Jan. 23, 2013), http://usun.state.gov/briefing/statements/203162.htm, U.S. citizens born in the West Bank and Gaza Strip before May 14, 1948 may elect to list their place of birth either as "Palestine" or as "West Bank" or "Gaza Strip." 7 FAM 1360(c), (d), App. D (7 FAM 1383.5-5 (1987), JA 112-13). Likewise, U.S. citizens born before May 14, 1948, in a location outside Jerusalem's then-municipal limits, but since annexed into the city, can also elect to list "Palestine" as their place of birth, despite the fact that they were born in present-day Jerusalem. 7 FAM 1360(f), (h), App. D (7 FAM 1383.5-6 (1987), JA 113).

Allowing such alternative listings on U.S. passports as a matter of personal affinity and self-identification refutes the Executive's claim that the birthplace listing is tantamount to a statement of recognition. Listing "Jerusalem" on the passports of some U.S. citizens born in Jerusalem and "Israel" on others' does not constitute U.S. recognition of Israel's claim to sovereignty over Jerusalem. That the Department's policies provide for varied—and potentially confusing—listings of birthplace in passports undermines the Executive's claim that adhering to section 214(d) would constitute recognition of Israeli sovereignty over Jerusalem.[9]

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[9] Nor does the possibility of misperception by some foreign observers about the import of permitting alternative birthplace specifications on passports support the Executive's claim

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In sum, the Executive's own statements and policies on the "place of birth" designation confirm that the purpose of listing the birthplace in passports and consular birth reports is to aid in identifying the passport bearer and that such listings do not constitute a statement of official recognition.

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that such listings constitute acts of recognition. Just as someone viewing a U.S. passport that lists "Palestine" as place of birth would not necessarily know (and, indeed, would be very unlikely to know) whether the passport bearer was born in a location within the present municipal boundaries of Jerusalem, and thus would not likely confuse such a listing as a statement of U.S. policy on Jerusalem, so, too, is a passport listing "Israel" as place of birth unlikely to be identified with Jerusalem, rather than other cities in Israel, such as Tel Aviv or Haifa. (Section 214(d) does not under any circumstance provide for a passport to list "Jerusalem, Israel." This case, therefore, does not present any potential for confusion over that.)

Indeed, unlike a passport that, in accord with section 214(d), lists "Israel"—a sovereign nation recognized by the United States—a passport listing "Palestine" would more likely cause confusion over recognition; a viewer of such a passport might reasonably, but erroneously, infer that the United States recognizes a sovereign state of Palestine, especially given the State Department's general policy of listing as the place of birth the nation currently sovereign over the actual birthplace. To the extent that review of the Foreign Affairs Manual would reveal that the designation of Palestine is used only for persons born before 1948 and, thus, that listing "Palestine" as a place of birth does not speak to the current status of that political entity or of Jerusalem, so, too, do official statements of the President make clear that the designation of "Israel" as birthplace on a U.S. passport under section 214(d) does not constitute recognition of Israeli sovereignty over Jerusalem. *See* Statement by the President on Signing Foreign Relations Authorization Act, FY 2003, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002). It is unclear how these cases materially differ except for the Executive's assertion that the latter instance implicates recognition and the former does not.

Accordingly, permitting U.S. citizens born in Jerusalem to choose to list "Israel" as the place of birth on their passports under section 214(d) does not effectuate the recognition of any nation's claim to sovereignty over Jerusalem, nor infringe upon the Executive's decision not to recognize any nation's sovereignty over Jerusalem.[10]

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[10] That section 214 is headed "United States Policy with Respect to Jerusalem as the Capital of Israel" does not render subsection (d) a recognition of Israel's sovereignty over Jerusalem. Section 214's heading more accurately reflects the three preceding subsections of section 214, *see* Pub. L. No. 107-228, § 214(a)-(c), 116 Stat. 1365-66 (addressing diplomatic and political status of Jerusalem), none of which is at issue in this case. The only provision at issue here, subsection (d), is limited to providing an option for citizens born in Jerusalem to have their birthplace listed as "Israel" on their passports and birth reports. Section 214's heading does not change the scope of section 214(d) or transform this constitutional exercise of Congress' passport power into an impermissible intrusion on the recognition power. Whether subsection (d) infringes on the recognition power cannot depend on whether it is part of section 214 or is in another section with a different heading or no heading.

Indeed, the governing federal statute concerning the diplomatic status of Jerusalem is not section 214(d), but the Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398 (1995), which was enacted seven years before section 214(d) and remains in effect. That statute conditions the expenditure of funds appropriated to the State Department for buildings abroad on the relocating of the U.S. Embassy in Israel to Jerusalem. *Id.* § 3, 109 Stat. 399. In deference to the Executive, however, Congress authorized the President to suspend the limitation for 6-month periods if he determines that "such suspension is necessary to protect the national security interests of the United States." *Id.* § 7(a), 109 Stat. 400. The President has exercised this statutory prerogative and suspended the appropriations limitation ever since enactment. *See, e.g.*, Sus-

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B. Section 214(d) Does Not Affect Any of the Consequences of Recognition of Foreign States.

That section 214(d) does not constitute an exercise of the power of recognition is evidenced by the fact that section 214(d) does not bring about any of the legal consequences of recognition. Recognition of a foreign state is:

> formal acknowledgment that the entity possesses the qualifications for statehood, and implies a commitment to treat that entity as a state. . . . Recognition of a [foreign] government is formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state.

Restatement (Third) of the Foreign Relations Law of the United States § 203 comment a. As the court of appeals explained, recognition of a foreign sovereign by the U.S. Government confers benefits on that sovereign, permitting it to:

> (1) maintain a suit in a United States court, *see* [*Banco Nacional v. Sabbatino*, 376 U.S. 398, 408-09 (1964)]; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938); (2) assert the sovereign immunity defense in a United States court, *see Nat'l City Bank v. Republic of China*, 348 U.S. 356, 359 (1955); and (3) benefit from the "act of state" doctrine, which provides that "[e]very sovereign state is bound to re-

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pension of Limitations Under the Jerusalem Embassy Act, 79 Fed. Reg. 33,839 (June 2, 2014).

> spect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918).

Zivotofsky, 725 F.3d at 205 (parallel citations omitted); *see also* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 803 (2011) ("A nonrecognized state or government cannot sue in the courts of the United States, except perhaps if given clearance by the State Department. Nor can it ordinarily invoke the doctrine of foreign sovereign immunity.")(internal footnotes omitted).

Allowing U.S. citizens born in Jerusalem to elect to list their place of birth as "Israel" on passports and birth reports does not affect any consequences of formal recognition of the status of Jerusalem. It does not change how U.S. courts treat Israel or Jerusalem in legal matters. *Cf. United States v. Pink*, 315 U.S. 203, 223 (1942) ("recognition of a foreign sovereign conclusively binds the courts"). It does not determine the status of any sovereign property. It does not alter the treatment of the judgments of the local Jerusalem courts by U.S. courts. It does not affect the immunity of any sovereign in U.S. courts. *Cf. Nat'l City Bank v. Republic of China*, 348 U.S. 356, 358 (1955). It does not require the President to receive ambassadors from, or send ambassadors to, any country, nor to confer any benefits that flow from recognition regarding Jerusalem or its relationship to Israel. In short, section 214(d) does not affect the position of the United States, as expounded by the President, regarding the recogni-

tion of sovereignty over Jerusalem, nor carry any of the legal consequences of recognition. Thus, section 214(d) neither usurps nor infringes on the recognition power.

C. Section 214(d) Does Not Intrude on the Recognition Power Merely Because the Executive Fears Adverse Foreign Policy Consequences.

The court of appeals erred in concluding that Congress' exercise of its legislative passport power in section 214(d) impermissibly intrudes on the recognition power because of the President's concern that perception abroad, accurate or not, of the significance of birthplace designations on U.S. passports could spawn "adverse foreign policy consequences." *Zivotofsky*, 725 F.3d at 219-20. That conclusion mistakenly conflates the recognition power with the Executive's role in carrying out the Nation's foreign policy generally. By so conflating these matters, the court expanded the scope of the President's recognition power, improperly limiting Congress' authority over passports and upsetting the delicate balance between the Executive and Legislative Branches in the realm of foreign affairs.

Under the Constitution, the two political branches share responsibility over foreign affairs. *See Zschernig v. Miller*, 389 U.S. 429, 432 (1968) ("the Constitution entrusts to the President and the Congress" the "field of foreign affairs"); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government . . . ."). Congress exercises legislative authority in numerous areas significantly affecting

foreign policy. Congress appropriates all funds for the conduct of foreign, as well as domestic, policy; regulates foreign commerce; and lays customs duties and tariffs. U.S. Const. art. I, § 8, cls. 1, 3. Congress declares war; raises and supports armies; provides and maintains the navy; and defines and punishes offenses on the high seas and against the law of nations. *Id.* art. I, § 8, cls. 10-14. The Senate ratifies treaties and provides advice and consent to the appointment of ambassadors and other public ministers and consuls. *Id.* art. II, § 2, cl. 2.

Obviously, legislation in these areas may have profound "foreign policy consequences." *Zivotfosky*, 725 F.3d at 219. There is no doubt that Congress' declaration of war or the Senate's refusal to ratify a treaty or to confirm an ambassadorial appointment may have significant, and even grave, foreign policy consequences. It is equally clear that whatever the consequences—and however detrimental the legislation or Senate action may be to the foreign relations of the United States in the President's view—the specter of adverse foreign policy consequences does not render such legislative action unconstitutional. By striking down section 214(d) because the Executive believes it has harmful foreign policy consequences, the court of appeals improperly constricted Congress' legitimate exercise of legislative authority.

The court of appeals also abdicated judicial oversight of Executive action. Having linked exercise of the recognition power to effects on foreign policy, the court accepted as "conclusive" the Executive's "view" that section 214(d) would "cause adverse foreign policy consequences," because the Judiciary is "not equipped to second-guess the Executive regard-

ing the foreign policy consequences of section 214(d)." *Id.* at 219-20. Hence, under the court's reasoning, the constitutionality of section 214(d) is entirely dependent on the Executive's view of the statute's potential effect on foreign policy, effectively—and improperly—ceding to that Branch the courts' responsibility to decide the constitutionality of congressional enactments. *See Zivotofsky*, 132 S. Ct. at 1428 ("The Judicial Branch appropriately exercises" the "power to determine the constitutionality of a statute," irrespective of whether the statute touches on foreign affairs or has other political implications, "in a case such as this, where the question is whether Congress or the Executive is aggrandizing its power at the expense of another branch") (internal quotation marks and citation omitted). Indeed, hinging the constitutionality of section 214(d) on the Executive's effectively unreviewable assessment of the statute's foreign policy consequences essentially transforms the issue into a non-justiciable political question committed to the Executive—a conclusion this Court expressly rejected when this case was last before it. *Id.* ("[T]here is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute.").

In sum, the court of appeals, by mistakenly equating an effect on foreign policy with intrusion on the recognition power, failed to subject the Executive's assertion of exclusive power over birthplace listings in passports to the exacting scrutiny called for by Justice Jackson in *Youngstown*, thereby allowing the Executive to disregard a statute properly enacted in the exercise of Congress' powers

over matters of naturalization and foreign commerce.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and sustain the constitutionality of section 214(d).

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-628

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IN THE

Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, by his parents and guardians, ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

—v.—

JOHN F. KERRY, SECRETARY OF STATE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE ZIONIST ORGANIZATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae is the Zionist Organization of America (ZOA), the oldest and one of the largest pro-Israel organizations in the United States, whose leaders have included U.S. Supreme Court Justice Louis D. Brandeis, Rabbi Stephen Wise and Rabbi Dr. Abba Hillel Silver.[1] Since its founding in 1897, the ZOA has advocated for the safety and security of Israel as the homeland of the Jewish people, with Jerusalem as Israel's eternal and undivided capital. With chapters throughout the United States and an office in Israel, the ZOA has a deep and abiding interest in ensuring that the statute at issue in this case—Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1366 (2002)—is upheld and enforced.

Section 214(d) affords American citizens born in Jerusalem the right to have "Israel" listed as their birthplace on their passports, certifications of nationality, and registrations of birth. Some ZOA members have a personal stake in the constitutionality and enforceability of Section 214(d). They were born in Jerusalem or are the parents or legal guardians of children born in Jerusalem, and they want to identify themselves or their children as

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[1] Counsel of record for the parties received timely notice of the ZOA's intent to file this brief and they consented to the filing. Their letters of consent have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person or entity other than the ZOA made a monetary contribution to the preparation and submission of this brief.

American citizens born in Israel. All ZOA members appreciate the significance of Jerusalem to Israel and the Jewish people – it is Judaism's holiest city. When the State of Israel was established in 1948, Jerusalem once again became the capital of a sovereign Jewish nation, more than 3000 years after King David made Jerusalem the capital of his kingdom.

Protecting the right afforded under Section 214(d) is of such importance to the ZOA that in 2003, at or about the time the Petitioner, Menachem Binyamin Zivotofsky, filed his action, the ZOA filed a similar action on behalf of another American citizen born in Jerusalem, whose request to have "Israel" listed as his birthplace on his passport and registration of birth had also been denied by the State Department. *Odenheimer v. United States Department of State*, No. 03-CV-02048-GK (D.D.C. filed Oct. 3, 2003). After the district court consolidated the *Zivotofsky* and *Odenheimer* cases, the defendants moved to dismiss them. The plaintiffs in both cases opposed the motions and filed cross-motions for summary judgment. By the time the district court issued its decision, granting the motions to dismiss and denying the motions for summary judgment as moot (*Zivotofsky ex rel. Zivotofsky v. Secretary of* State, 2004 WL 5835212 (D.D.C. Sept. 7, 2004)), the ZOA had withdrawn from the case, for reasons unrelated to its merits. The *Odenheimer* case was terminated on September 16, 2004.

Nevertheless, the ZOA's interest in ensuring that Section 214(d) is upheld and enforced as clearly written has never wavered. On August 5, 2011, the ZOA submitted an *amicus curiae* brief to this

Court in support of the Petitioner. On July 27, 2012, the ZOA submitted an *amicus* brief to the U.S. Court of Appeals for the District of Columbia after the case was remanded there.

SUMMARY OF THE ARGUMENT

Enforcing Section 214(d) so that American citizens born in Jerusalem can choose to have "Israel" listed as their birthplace on their passports cannot be said to impermissibly infringe on a Presidential power to recognize foreign sovereigns. Such passports would not link Jerusalem to Israel; no city would be recorded on the passports and they could thus belong to Americans born in Jerusalem or Tel Aviv or any other city indisputably within sovereign Israel. These passports would be no more an articulation of U.S. foreign policy regarding the status of Jerusalem than the pronouncements of the Executive branch of the U.S. government itself. In documents and delivered remarks, departments, agencies and members of the Executive branch have repeatedly referred to Jerusalem as part of Israel, without impinging on a Presidential recognition power. Enforcing 214(d) would simply require the State Department to accommodate the personal preferences of Jerusalem-born Americans who want to identify with Israel, in the same way that the State Department already defers to the personal identity preferences of Americans who do *not* want to identify with Israel.

ARGUMENT

I. Section 214(d) Cannot Be Said To Impermissibly Infringe On The President's Foreign Policy Powers Under The Constitution When Departments And Agencies In The Executive Branch Routinely Refer To Jerusalem As Part Of Israel Without Any Evident Impact on Those Powers

Section 214(d) provides: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1366 (2002). The notion that enforcing Section 214(d)—which was signed into law by the President—would impermissibly infringe on the President's foreign policy powers under the Constitution is difficult to defend in light of the Executive's own conduct when it comes to Jerusalem.

For years, departments and agencies in the Executive branch of the United States government—including the U.S. Department of State—have routinely referred to Jerusalem as part of the State of Israel. Even the White House has referred to Jerusalem as part of Israel, as has the President, without any evident impact on the President's foreign policy powers under the Constitution. It is thus difficult to conceive of how enforcing Section 214(d) to permit Jerusalem-born

Americans to list "Israel" on their passports would have any such impact—particularly since there would be no way to know from such passports whether these Americans were born in Jerusalem or in a city indisputably within sovereign Israel, such as Tel Aviv or Haifa.

In the *amicus* brief filed with this Court in August 2011, the ZOA provided numerous examples of official government documents that refer to "Jerusalem, Israel," including "Official White House photos" on the White House's Web site. After news reports revealed these "Jerusalem, Israel" references, many of the photos and documents were altered. Photos and documents that once said "Jerusalem, Israel" were changed to read "Jerusalem" only, with the references to "Israel" eliminated. *See, e.g.*, Adam Kredo, *Solving the White House Photo Mystery Over "Jerusalem, Israel,"* Aug. 16, 2011, http://www.jta.org/2011/08/16/news-opinion/politics/solving-the-white-house-photo-mystery-over-jerusalem-israel.

The altered documents are described below, as are the many government documents and the remarks of government officials that continue to refer to Jerusalem as part of the State of Israel.

A. The Department of Justice's References to "Jerusalem, Israel"

In a United States Attorneys Bulletin published by the Justice Department on December 7, 1973, the Department identified those persons engaged in certain activities on behalf of foreign principals, requiring that they register with the Attorney General under the Foreign Agents Registration Act. Among the registrations identi-

fied: "Hilton Goldman of Newark New Jersey registered as agent of Haligh L'Haganah Y'Ludit L'Yisroel (Meir Kahane), **Jerusalem, Israel**." http://www.justice.gov/usao/eousa/foia_reading_room/usab2125.pdf at 962 (emphasis added).

In March 1998, the Justice Department's Office of the Inspector General (OIG) issued a "Special Report" entitled "Bombs in Brooklyn: How the Two Illegal Aliens Arrested for Plotting to Bomb the New York Subway Entered and Remained in the United States." http://www.justice.gov/oig/special/9803/. In its discussion of one of the aliens, the OIG noted that the alien "applied at the U.S. Consular Office in **Jerusalem, Israel**, for a visa to travel through the United States to Ecuador." *Id.* (emphasis added).

The U.S. Drug Enforcement Administration (DEA) in the Justice Department posts a "most wanted" list of DEA fugitives, including a photo and other identifying information about each fugitive. The DEA identified a Miami fugitive, wanted for an alleged federal drug violation, as having a "POB" [place of birth] of "**Jerusalem, Israel**." http://www.justice.gov/dea/fugitives/mia/CB3ED150-141E-4137-BA6D-B931353322C5.shtml (emphasis added).

The Justice Department's Federal Bureau of Investigation (FBI) has offices around the world which are called legal attachés or legats and are located in U.S. embassies. http://www.fbi.gov/contact-us/legat. The FBI has identified one of its "sub-offices" in the Middle East as being in "**Jerusalem, Israel**." http://www.fbi.gov/contact-us/legat/middle_east (emphasis added).

The Justice Department's Office of Justice Programs (OJP) helps to "identify the most pressing crime-related challenges confronting the justice system and to provide information, training, coordination, and innovative strategies and approaches for addressing these challenges." http://ojp.gov/about/about.htm. There are several components to the OJP, one of which is the Office for Victims of Crime.

In 2009, the Office for Victims of Crime issued a Report to Congress—entitled "International Terrorism Victim Expense Reimbursement Program"—which presented detailed data and statistical information on the program's activities from June 2007 through August 2008. http://www.ovc.gov/itverp/pdfs/ITVERP_2009_ReportoCongress.pdf. The report lists incidents that have been designated as acts of terrorism by the Assistant Attorney General for National Security, so that victims of international terrorism and their families can be reimbursed for the expenses they have incurred as a direct result of a terrorist act.

In three tables set forth in the report, the Office for Victims of Crime identified two terrorism incidents as having occurred in "**Jerusalem, Israel**," and provided this information to Congress. *See id.* at 8, 9, 23 (emphasis added).[2]

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[2] In 2010 and 2011, the Office for Victims of Crime designated additional incidents as acts of terrorism; included on the list were terrorism incidents that were designated as far back as July 27, 2007. These designations used to be available at http://www.ojp.usdoj.gov/ovc/intdir/itverp/terrorist_events.html.

At least until the ZOA filed its *amicus* brief with this Court in August 2011, the Office for Victims of Crime identified 14 incidents on this list as having occurred in

B. The Department of Defense's References to "Jerusalem, Israel"

The Office of the Under Secretary for Personnel and Readiness in the Department of Defense published a table of approved Joint Meritorious Unit Awards. The awards are listed by Department of Defense activity and the inclusive dates. The Department identified one activity as "HQ, U.S. Military Observer Group, U.N. Truce Supervision Organization, "**Jerusalem, Israel**" from June 5, 1982-June 5, 1983. http://prhome.defense.gov/Portals/52/Documents/RFM/MPP/OEPM/Docs/Approved%20JMUAs%20-%20Updated%2031%20Dec%202012.pdf (emphasis added).

A news article dated April 23, 1998, and issued by the American Forces Press Service, described Defense Secretary William S. Cohen honoring Holocaust victims at Yad Vashem. The Defense Department reported this as news from "**Jerusalem, Israel**." http://www.defense.gov/news/newsarticle.aspx?id=41567 (emphasis added).

The Defense Department regularly issues news releases announcing the awarding of defense con-

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"Jerusalem, Israel." An additional incident was more specifically described as having occurred in **"East Jerusalem, Israel,"** and another was identified as having occurred in **"West Jerusalem, Israel."** But sometime in or after August 2011, these designations were altered. When the ZOA filed its *amicus* brief with the U.S. Court of Appeals in July 2012, the incidents were at that point identified as having occurred in "Jerusalem" only; the references to "Israel" had been eliminated. In preparing this brief, the ZOA could not locate this information at all; typing in the URL above resulted in the message, "Page Not Found."

tracts. One such news release, issued on August 29, 2001, includes a description of an Air Force contract awarded to BAE Systems, in Austin, Texas. The Department of Defense noted in this release that "Rokar International Limited will perform this work in **Jerusalem, Israel** (80%) and other locations." http://www.defense.gov/contracts/contract.aspx?contractid-2093 (emphasis added).

Another Defense Department news release issued on July 31, 2009, announced a Navy contract awarded to General Microwave, D/B/A Herley Farmingdale, noting that the "[w]ork will be performed in **Jerusalem, Israel**, and is expected to be completed in July 2014." http://www.defense.gov/Contracts/Contract.aspx?ContractID=4084 (emphasis added).

On February 27, 2012, the Defense Department announced a Navy contract where the "[w]ork will be performed in **Jerusalem, Israel** (90 percent), and Syosset, N.Y. (10 percent), and is expected to be completed in February 2017." http://www.defense.gov/contracts/contract.aspx?contractid=4734 (emphasis added).

Military service members are paid additional compensation called "hardship duty" when they are "assigned to locations where living conditions are substantially below those conditions in the continental U.S." http://militarypay.defense.gov/pay/hdp.html. Pursuant to Defense Department regulations, hardship duty location pay was authorized for service members in designated areas in **Israel**, specifically including **Jerusalem**. *See* http://comptroller.defense.gov/Portals/45/documents/fmr/archive/07aarch/07a_17_Dec10.pdf at 17-11, 17-20 (Dec.

2010); http://comptroller.defense.gov/Portals/45/documents/fmr/archive/07aarch/07a_17_200408.pdf at 17-10, 17-18 (Aug. 2004) (emphasis added).

Photos on the Defense Department's Web site—many depicting meetings between U.S. and Israeli government officials—contain captions that identify the photos as having been taken in "**Jerusalem, Israel.**" These captions include the following descriptions:

- "Defense Secretary Robert M. Gates meets with Israeli Prime Minister Ehud Olmert in **Jerusalem, Israel**, April 19, 2007." http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2026&name=Gates Visits Israel, Part II (emphasis added).

- "Israeli Prime Minister Ehud Olmert speaks with Defense Secretary Robert M. Gates during a bilateral meeting in **Jerusalem, Israel**, April 19, 2007." http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2027&name=Gates Visits Israel, Part II (emphasis added).

- "U.S. Ambassador to Israel Richard Jones, Israeli Minister of Defense Amir Peretz, U.S. Defense Secretary Robert M. Gates, and Director General of Yad Vashem Avner Shalev attend a wreath laying ceremony at the Yad Vashem Holocaust Memorial in **Jerusalem, Israel**, April 19, 2007." http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2028&name=Gates Visits Israel, Part II (emphasis added).

- "Defense Secretary Robert M. Gates tours the Yad Vashem Children's Holocaust Memorial in **Jerusalem, Israel**, April 19, 2007." http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2030&name=Gates Visits Israel, Part II (emphasis added).

- A lieutenant colonel in the U.S Marine Corps "checks his aircraft's instruments as Marine One sits in the background in **Jerusalem, Israel**, Jan. 10, 2008." http://www.defense.gov/HomePagePhotos/LeadPhotoImage.aspx?id=4883 (emphasis added).

- "Secretary of Defense Robert M. Gates is greeted by Israeli Defense Minister Ehud Barack as he arrives in **Jerusalem, Israel**, during a trip to the Middle East on July 27, 2009." http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11509 (emphasis added).

- "Secretary of Defense Robert M. Gates and Israeli Prime Minister Benyamin Netanyahu shake hands during a working lunch meeting in **Jerusalem, Israel**, on July 27, 2009." http://www.defense.gov/Photos/newsphoto.aspx?newsphotoid=11510 (emphasis added).

- "Secretary of Defense Robert M. Gates and Israeli Defense Minister Ehud Barack hold a joint press conference in **Jerusalem, Israel**, during a trip to the Middle East on July 27, 2009." http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11512 (emphasis added).

- "Chief of Defense Israeli Defense Force Lt. Gen. Gabi Ashkenazi and Chairman of the Joint Chiefs of Staff Adm. Mike Mullen, U.S. Navy, wave to onlookers at the Yad Ve Shem [sic] Holocaust Memorial Museum in **Jerusalem, Israel**, on Feb. 15, 2010. Mullen is on a weeklong tour of the region visiting with key partners and allies." http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=12277 (emphasis added).

- "Secretary of Defense Leon E. Panetta . . . and Israeli President Shimon Peres meet in **Jerusalem, Israel**, on Aug. 1, 2012." http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=15520 (emphasis added).

- "Israel President Shimon Peres . . . meets with Chairman of the Joint Chiefs of Staff Gen. Martin E. Dempsey in **Jerusalem, Israel**, on Oct. 29, 2012." http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=15686 (emphasis added).

- "Secretary of Defense Chuck Hagel . . . meets with Israeli President Shimon Peres in **Jerusalem, Israel**, on April 22, 2013." http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=16135 (emphasis added).

- "Deputy Secretary of Defense Ashton B. Carter. . . meets with Israeli National Security Advisor Yaakov Amidror . . . in **Jerusalem, Israel** on July 22, 2013." http://www.defense.gov/Photos/newsphoto.aspx?newsphotoid=16353 (emphasis added).

The official web site of the United States Marine Corps displays a photo taken just a few months ago, with the following caption: "U.S. Marines and U.S. Navy Sailors listen to a tour guide describe the 'Old City' March 7, 2014, during a morale, welfare and recreation trip to **Jerusalem Israel**." http://www.marines.mil/Photos.aspx?igphoto=2000784579 (emphasis added).

C. The Department of Health and Human Services' References to "Jerusalem, Israel"

The Department of Health and Human Services posted the remarks delivered by Donna E. Shalala, Secretary of Health and Human Services, at the "Promoting Women's Health Across Generations Conference," on December 2, 1998. The Department identified the conference as having taken place in "**Jerusalem, Israel.**" http://archive.hhs.gov/news/speeches/981202.html(emphasis added).

The Centers for Disease Control and Prevention (CDC) is part of the Department of Health and Human Services. On April 14, 2008, CDC issued a press release entitled "CDC Urges Travelers to Israel to Protect Themselves from Measles; Concern Raised over Americans Traveling to Israel for Passover." The press release noted: "Since September, more than 900 cases of measles have been reported in **Israel**, with about 700 cases in the cities of **Jerusalem** and Beit Shemesh." http://www.cdc.gov/media/pressrel/2008/r080414a.htm (emphasis added).

The National Cancer Institute (NCI) is part of the National Institutes of Health, which is an

agency within the Department of Health and Human Services. An NCI Bulletin dated July 28, 2009, described a review of certain clinical trials conducted by "researchers . . . from the Shaare Zedek Medical Center in **Jerusalem, Israel**." http://www.cancer.gov/ncicancerbulletin/archive/2009/072809/page6 (emphasis added).

The National Institute of Biomedical Imaging and Bioengineering, which is part of the National Institutes of Health, identified one of its staff members as having "returned in 2011 to Hadassah Medical Organization in **Jerusalem, Israel**." http://www.nibib.nih.gov/about-nibib/staff/orit-jacobson-weiss (emphasis added).

The National Institute on Drug Abuse (NIDA) is also part of the National Institutes of Health. NIDA identified educational opportunities on its Web site, including "[a] 12-month master's degree program at Hebrew University of **Jerusalem in Israel** offering scholarships to students from developing countries." http://www.drugabuse.gov/international/educational-opportunities (emphasis added).

D. The Department of Homeland Security's References to "Jerusalem, Israel"

Created in 2003, U.S. Immigration and Customs Enforcement (ICE) is "the principal investigative arm of the Department of Homeland Security," with "more than 20,000 employees in offices in all 50 states and 47 foreign countries." http://www.ice.gov/about/overview/. In celebration of its tenth anniversary, ICE issued a news release dated April 3, 2013, in which it described 10 ICE offices from around the globe. ICE identified one such office in "**Jerusalem,**

Israel (HSI office)" and provided this description of Jerusalem: "**The capital city of Israel, Jerusalem is the largest city in Israel.** A holy city to three religions (Judaism, Christianity and Islam), Jerusalem is one of the oldest cities in the world." http://www.ice.gov/news/releases/1304/130403washingtondc.htm (emphasis added).

In April 2011, the Office of Inspector General in the Department of Homeland Security issued a report called "Information Sharing on Foreign Nationals: Overseas Screening (Redacted)." The report describes a legislatively mandated Visa Security Program that assists the State Department's effort to screen and vet visa applicants. http://www.oig.dhs.gov/assets/Mgmt/OIGr_11-68_Apr11.pdf

At the time the ZOA submitted its *amicus curiae* brief to this Court in August 2011, the report stated that U.S. Immigration and Customs Enforcement had established visa security units in 2010 in "Tel Aviv and **Jerusalem, Israel** . . ."(emphasis added). Sometime after the ZOA filed the brief, the report was altered. It now states that units were added in ". . . Tel Aviv, Israel, Sanaa, Yemen, and Jerusalem. . . ." *Id.* at 44 n.31. The reference to Jerusalem as part of Israel has been eliminated.

E. The Department of Housing and Urban Development's References to "Jerusalem, Israel"

When Secretary of Housing and Urban Development (HUD) Andrew Cuomo delivered remarks from Jerusalem on June 23, 2000, he stated: "Shalom from **Jerusalem**. . . . This is my first

trip to **Israel**. . . ." http://archives.hud.gov/remarks/cuomo/speeches/jerusalem.cfm (emphasis added).

On the same date, HUD issued a news release noting that Secretary Cuomo "was sent to **Israel** by President Clinton." The news release reported that "Cuomo began his day today with a visit to Yad Vashem, **Israel**'s Holocaust museum and memorial in **Jerusalem**. . . . In addition, the Secretary planted four trees at American Independence Park in **Jerusalem**. . . ." http://archives.hud.gov/news/2000/pr00-146.html (emphasis added).

F. The Department of the Treasury's References to "Jerusalem, Israel"

The Treasury Department's Alcohol and Tobacco Tax and Trade Bureau provides information about authorized wine appellations, both in the United States and in foreign countries. *See* http://www.ttb.gov/appellation/. On the list for foreign "Authorized Wine Appellations of Origin" (last updated on November 14, 2007), the Bureau noted that **Jerusalem** is located in **Israel**. http://www.ttb.gov/appellation/israel.pdf (emphasis added).

On October 31, 1999, the Treasury Department, through its Press Center, published Treasury Deputy Secretary Stuart E. Eizenstat's remarks at the Van Leer Institute in Jerusalem. At the beginning of his remarks, Deputy Secretary Eizenstat notes that "[f]or thirty years, the Van Leer Institute has been a center of scholarship, an active and thoughtful participant in Israeli civic life." He also repeatedly refers to Israel throughout his remarks, thus reflecting the Deputy Secretary's own understanding that he is in Jerusalem which is in Israel.

At the time the ZOA submitted its *amicus curiae* brief to this Court in August 2011, this press release was entitled "Treasury Secretary Stuart E. Eizenstat Remarks at the Van Leer Forum **Jerusalem, Israel**." Sometime thereafter, the press release was altered; the reference to "Israel" was eliminated. *See* www.treasury.gov/press-center/press-releases/Pages/ls190.aspx.

Despite that alteration, three more recent Treasury Department documents specifically refer to Jerusalem as part of Israel. On January 24, 2012, the Treasury Department issued a "Daily Treasury Guidance," noting that Deputy Secretary Wolin and Deputy Secretary of State Nides would be meeting that morning "in **Jerusalem, Israel** with Stanley Fischer, Governor of the Bank of Israel." http://www.treasury.gov/press-center/daily-guidance/Pages/01242012.aspx (emphasis added).

Likewise, a press release dated May 2, 2012, states: "The U.S. Department of the Treasury announced today that Assistant Secretary for Terrorist Financing Daniel L. Glaser will travel to Riyadh, Saudi Arabia; Kuwait City, Kuwait; Doha, Qatar; Tel Aviv and **Jerusalem, Israel**. . . ." http://www.treasury.gov/press-center/media-advisories/Pages/05022012.aspx (emphasis added).

In addition, as recently as last month, a Treasury Department Blog called "Treasury Notes" reported on June 19, 2014, about Jacob J. Lew's "first trip to the Middle East as Treasury Secretary." The Department's Blog noted the following: "Yesterday, Secretary Lew finished his trip to the Middle East by visiting **Jerusalem, Israel**, where Secretary Lew participated in and delivered

remarks at the U.S.-Israel Joint Economic Development Group's (JEDG) annual meeting with Israeli Finance Minister Yair Lapid." http://www.treasury.gov/connect/blog/Pages/Secretary-Lew-Middle-East-.aspx (emphasis added).

G. The Department of Commerce's References to "Jerusalem, Israel"

The National Telecommunications and Information Administration (NTA) at the U.S. Department of Commerce published the remarks of Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information, which were delivered on October 27, 2010, at the 32nd International Conference of Data Protection and Privacy Commissioners. http://www.ntia.doc.gov/print/speechtestimony/2010/remarks-assistant-secretary-strickling-32nd-international-conference-data-prote. The NTA identified the location of the conference as "**Jerusalem, Israel**." *Id.* (emphasis added).

The International Trade Administration (ITA) in the Commerce Department publicized a "Featured Trade Event" on February 20-24, 2011. At the time the ZOA submitted its *amicus* brief to the Supreme Court in August 2011, the ITA's headline about the event described it as a "Clean Tech and Health Care Technologies Trade Mission to Israel, Jordan, and the West Bank," taking place in "Amman, Jordan; Eilat, **Jerusalem**, and Tel Aviv, **Israel**" (emphasis added). In describing the event, the ITA stated that the trade mission would be stopping in Amman, Jordan, and "**Jerusalem** and Tel Aviv, **Israel**. . ." (emphasis added).

Since the ZOA filed that brief, the document has been altered. Every reference to "Jerusalem" has been deleted. *See* http://trade.gov/publications/ita-newsletter/1110/clean-tech-health-care-mission.asp.

H. The Department of Transportation's References to "Jerusalem, Israel"

In November 2004, the Department of Transportation issued a Final Report on "Transit Security Design Considerations." http://transit-safety.volpe.dot.gov/security/securityinitiatives/designconsiderations/CD/ftasesc.pdf. The Report "provides transit agencies with a resource for considering and selecting security oriented design approaches to protecting transit systems and minimizing the impacts of terrorist attacks." *Id.* at 1-4. In discussing past events to learn from, the Department devotes a section of the report to attacks on transit vehicles in "**Jerusalem, Israel**." *Id.* at 7-26. In addition, Appendix A to the report (entitled "Chronology of Terrorist Attacks Against Public Transit"), makes 17 references to terrorist attacks in "**Jerusalem, Israel**" (including one reference to "**West Jerusalem, Israel**"). *Id.* at A-1—A-3, A-6—A-7, A-13—A-14.

The Transportation Department's Federal Highway Administration (FHA) lists "evacuations in the news." For June 8-14, 2009, under the heading "Malevolent Acts," the FHA listed the following: "West Bank, **Jerusalem, Israel** (illegal outposts)." http://www.ops.fhwa.dot.gov/eto_tim_pse/evac-newsarchive/2009/june/ (emphasis added). For June 15-21, 2009, under the heading "Planning," the FHA listed: "**Jerusalem, Israel**, the Knesset's Interior Committee and the Committee for the Rights of the

Child met in a joint session to discuss evacuation procedures of children while outposts are being evacuated." *Id.* (emphasis added). For August 3-9, 2009, under the heading "Planning," the FHA listed the following: "Police deal with law suits from 2006 evacuation of the Reches Sela outpost on the West Bank, **Jerusalem, Israel**." http://www.ops.fhwa.dot.gov/eto_tim_pse/evacnewsarchive/2009/aug/(emphasis added).

I. The Department of State's References to "Jerusalem, Israel"

The State Department has routinely referred to Jerusalem as part of the State of Israel. The ZOA gave several examples of these "Jerusalem, Israel" references in its *amicus* brief to this Court in August 2011. Since the filing of that brief, some of the references have been altered. Documents that once referred to "Jerusalem, Israel" now say "Jerusalem" only, with the references to "Israel" deleted.

For example, in December 2003, the State Department's Bureau of Resource Management issued a "FY 2003 Performance and Accountability Report." The report sets forth "Department of State Locations" around the world, including American Embassies, the Consulates General and the Consulates. At the time the ZOA filed its *amicus* brief with this Court in August 2011, the State Department's report referred to a Consulate General location in "**Jerusalem, Israel**" (emphasis added). Likewise, in its report for Fiscal Year 2002, the State Department's Bureau of Resource Management referred to a Consulate General location in "**Jerusalem, Israel**"(emphasis added).

At some point after the ZOA filed the August 2011 brief, these documents were changed. Both reports now identify the location of the Consulates General as being in "Jerusalem"; the references to "Israel" have been eliminated. *See* http://www.state.gov/s/d/rm/rls/perfrpt/2003/html/29446.htm (FY 2003); http://www.state.gov/s/d/rm/rls/perfrpt/2002/html/19200.htm (FY 2002).

The same alteration was made to another document—"Country Reports on Terrorism 2009"—issued by the State Department's Office of the Coordinator for Counterterrorism on August 5, 2010. As the ZOA noted in its *amicus* brief to this Court in August 2011, the report included a section about the U.S.-designated foreign terrorist organization Hamas, noting that Hamas had claimed responsibility for driving a vehicle into a crowd "in **Jerusalem, Israel**" (emphasis added).

Since the ZOA filed that brief, the State Department report has been altered to reflect that Hamas' terrorist act occurred in "Jerusalem." The reference to "Israel" has been expunged. http://www.state.gov/j/ct/rls/crt/2009/140900.htm.[3]

Despite all these alterations to undo the State Department's references to "Jerusalem, Israel," sev-

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[3] The State Department also published a table (Table XIX) entitled "Nonimmigrant Visas Issued by Issuing Office (Including Border Crossing Cards) Fiscal Years 1992-2010," which was similarly altered. At the time the ZOA filed its *amicus* brief with this Court in August 2011, the table identified the location of one of the issuing offices in "**Israel, Jerusalem,**" http://www.travel.state.gov/pdf/MultiYearTableXIX.pdf (no longer available) (emphasis

eral still remain and more have been added. For example, the May 1999 issue of *State Magazine*, a State Department publication, identifies that certain J. Kirby Simon Trust Projects (named in memory of an officer in the Foreign Service) included projects in "Tel Aviv and **Jerusalem, Israel**." http://www.state.gov/documents/organization/191089.pdf at 35 (emphasis added).

In addition, on July 22, 2002, the Federal Register posted the State Department's list of gifts made to federal employees from foreign government sources which were reported to the employing agencies in 2001. Among the gifts listed by the State Department was a framed photograph of "then-Governor Bush at the Western Wall in **Jerusalem, Israel**." https://www.federalregister.gov/articles/2002/07/22/02-16498/gifts-to-federal-employees-from-foreign-government-sources-reported-to-employing-agencies-in (emphasis added).

A document entitled "Embassy Security, Construction, and Maintenance," describes the activities of the Bureau of Overseas Buildings Operations, which "is responsible for providing U.S. Diplomatic and Consular missions overseas with secure, safe and functional facilities to assist them in achieving the foreign policy objectives of the United States." http://www.state.gov/documents/organization/181119.pdf at 467. This document lists 88 new facilities completely constructed since 2001,

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added). By the time the Court remanded this case to the Court of Appeals and the ZOA filed an *amicus* brief there, the location had been changed to refer to "Jerusalem" only; "Israel" was removed from the table. Presently, the ZOA cannot find the table on the State Department's Web site at all.

including a facility in "**Jerusalem, Israel**." *Id.* at 469 (emphasis added).

The State Department posted on its Web site the remarks that Secretary of State Hillary Rodham Clinton delivered with Israeli Prime Minister Ehud Olmert on March 3, 2009. http://www.state.gov/secretary/20092013clinton/rm/2009a/03/119965.htm. The State Department noted that these remarks were delivered in **Jerusalem**. Toward the end of her remarks, Secretary of State Clinton is quoted as stating, "I am very grateful, once again, to be **here in Israel**. . ." (emphasis added), plainly reflecting the Secretary of State's own understanding that Jerusalem is part of the State of Israel.

The State Department's Bureau of Diplomatic Security issued a report entitled "Diplomatic Security, 2012 Year in Review." http://www.state.gov/documents/organization/210836.pdf. The report includes a timeline identifying events affecting U.S. diplomatic personnel at their posts, including two events that occurred in "**Jerusalem, Israel**": "Sept 14, **Jerusalem, Israel**: Anti-U.S. protests"; and "Nov 20, **Jerusalem, Israel**: Israeli air-raid sirens activate; U.S. Consulate General personnel take shelter as one rocket strikes city." *Id.* at 29, 43 (emphasis added).

HumanRights.gov is "the official United States Government (USG) website for human rights related information." http://www.humanrights.gov/about/. The Web site is managed by the Office of Policy Planning and Public Diplomacy, in the State Department's Bureau of Democracy, Human Rights and Labor. *Id.* On November 16, 2012, this official

government Web site displayed a photo depicting the celebration in "**Jerusalem, Israel**" of the 57th U.S. presidential elections, and it referred to the "U.S. Embassy in **Jerusalem, Israel**." http://www.humanrights.gov/2012/11/16/observing-the-u-s-election-jerusalem-israel/ (emphasis added).

At the beginning of this year, the State Department posted Secretary of State John Kerry's remarks delivered in "Jerusalem" on January 5, 2014. Secretary Kerry himself acknowledged that Jerusalem is part of Israel when he stated, "Obviously, it is this effort to try to make peace that has brought [us] **back here again to Israel, to Jerusalem**." http://www.state.gov/secretary/remarks/2014/01/219298.htm (emphasis added).

J. The Executive Office of the President's References to "Jerusalem, Israel"

Even the Executive Office of the President has referred to Jerusalem as part of the State of Israel. In its August 2011 *amicus* brief to this Court, the ZOA identified a series of photos on the White House Web site depicting the Vice President's 2010 trip to the Middle East. The captions to these "Official White House Photos" described Vice President Joe Biden and his wife, Dr. Jill Biden, as being in "Jerusalem, Israel." For example, one photo included this caption: "Vice President Joe Biden laughs with Israeli President Shimon Peres in **Jerusalem, Israel**, March 9, 2010" (emphasis added).[4]

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[4] On August 9, 2011, the *Weekly Standard* posted a screen-shot of this photo with the reference to "Jerusalem, Israel." *See* Daniel Halper, *White House Cleanses Israel*

After the ZOA filed its *amicus* brief, the White House altered the captions to these photos. *See* Adam Kredo, *Solving the White House Photo Mystery Over "Jerusalem, Israel,"* Aug. 16, 2011, http://www.jta.org/2011/08/16/news-opinion/politics/solving-the-white-house-photo-mystery-over-jerusalem-israel. Now, they identify Vice President Biden and his wife as being in "Jerusalem" only. The references to "Israel" have been deleted. *See* http://www.whitehouse.gov/photos-and-video/photo-gallery/vice-president-and-dr-biden-middle-east.

The White House has not, however, completely scrubbed its Web site of all references to Jerusalem as part of Israel. In a posting about the Peace Corps, the White House described the activities of one Peace Corps volunteer, including that her "first foreign service assignment will be in **Jerusalem, Israel** beginning August 2011." http://www.whitehouse.gov/champions/peace-corps/adrienne-fagler (emphasis added).

More recently, a White House press release dated August 12, 2013, announced President Obama's intent to appoint several individuals to "key Administration posts," including S. Fitzgerald Haney, who was described as having been a senior associate at a venture capital firm in "**Jerusalem, Israel**." http://www.whitehouse.gov/the-press-office/2013/08/12/president-obama-announces-more-key-administration-posts (emphasis added).

Even President Obama has referred to Jerusalem as part of Israel. On May 21, 2014, the

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from Website, Weekly Standard, Aug. 9, 2011, http://www.weeklystandard.com/blogs/white-house-cleanses-israel-website_588127.html.

President was walking through a park in Washington, DC on his way to the Department of the Interior, greeting members of the public and shaking the hands of people he passed. When one individual told President Obama it was his birthday, the President wished him a "happy birthday" and asked him where he was from. When the individual said he was from "**Israel**," President Obama asked him, "Tel Aviv or **Jerusalem**?" http://www.shalomlife.com/news/23617/obama-wishes-an-israeli-man-happy-birthday-video/. (A video of the President's walk is posted on the White House Blog, but the portion in which he refers to Jerusalem as part of Israel has been edited out. *See* http://www.whitehouse.gov/blog/2014/05/22/raw-video-president-obama-takes-surprise-walk.)

All of the foregoing examples show that for years, departments and agencies in the Executive branch of the government have regularly referred to Jerusalem as part of the State of Israel, without any evident impact on the President's foreign policy powers. The State Department frequently has referred to Jerusalem as part of Israel. Even the White House has done so. It is thus hard to conceive of exactly how there would be any impermissible impact on the President's authority under the Constitution if American citizens born in Jerusalem were permitted to have "Israel" listed as their birthplace on their passports—particularly since such passports would not reflect or reveal whether the particular passport holder was born in Jerusalem or in a city unquestionably within sovereign Israel, such as Tel Aviv or Haifa.

II. Birthplace Listings On The Passports Of Americans Born Abroad Do Not Always Reflect A Country's U.S.-Recognized Sovereignty Over An Area, And May Even Ignore Such Sovereignty To Accommodate Personal Preferences

The State Department would have this Court believe that American citizens born in Jerusalem cannot have "Israel" recorded as their birthplace on their passports because the United States has not officially recognized Jerusalem as part of the State of Israel. But what the U.S. government has or has not officially recognized does not always govern. The State Department will sometimes defer to the personal preferences of American citizens—even to the point of disregarding a country's sovereignty over the area of the citizens' birth—when recording their birthplace on their passports. Indeed, this has been the State Department's policy and practice with regard to American citizens born in the U.S.-recognized sovereign State of Israel who do *not* want to be identified with Israel.

The State Department's policies and practices for issuing passports are set forth in its Foreign Affairs Manual (FAM). *See* U.S. Department of State Foreign Affairs Manual, 7 FAM 1300, *available at* http://www.state.gov/m/a/dir/regs/fam/07fam/c22714.htm.[5] According to the FAM, the State Department's "general rule" is that an

[5] A different version of the Foreign Affairs Manual existed at the time that Petitioner filed suit, but the policies and practices discussed in this brief have not changed.

applicant's country of birth should be entered on his/her passport. 7 FAM 1383.1(2002).[6]

Yet the State Department will ignore this rule when it comes to Israel. If passport applicants were born before 1948, in an area that is presently and indisputably recognized by the U.S. government as under Israeli sovereignty (not including Jerusalem and certain other areas), then the State Department will not require them to list "Israel" as their birthplace on their passports if they object to that designation. They can request that "Palestine" be listed as their birthplace instead (7 FAM 1383.5-4)—even though "Palestine" is not and never has been a sovereign nation, and even though there is no question that the United States recognizes the area of the applicants' birthplace as under the present sovereignty of Israel.

The State Department will also ignore Israel's status as a sovereign nation when it comes to passport applicants born in Israel in or after 1948. If these passport applicants were born in an area that the U.S. government recognizes as part of the sovereign state of Israel, they are not required to have "Israel" listed on their passports if they object to it. *Id.* The State Department will honor their preferences and permit them to have their city or town recorded as their birthplace instead. *Id.*

But when American citizens born in Jerusalem *want* to identify with Israel by listing Israel as their birthplace—which is the right afforded to them under Section 214(d)—the State Department will not honor their preferences and accommodate their

[6] The FAM provisions cited in this brief refer to the 2002 version, which was in effect at all times relevant to this case.

requests. Incongruously—and to the ZOA, offensively—the State Department insists that in *that* situation, foreign sovereignty considerations must govern.

Plainly, it is not that the State Department cannot record "Israel" as the birthplace on the passports of American citizens born in Jerusalem. The State Department has simply chosen not to, without any showing that this particular designation—unlike all the other numerous "Jerusalem, Israel" designations by the various departments and agencies in the Executive—would actually impermissibly interfere with the President's foreign policy powers under the Constitution. The State Department's unsubstantiated decision should not be allowed to stand. The right afforded to American citizens born in Jerusalem to have "Israel" recorded as their birthplace on their passports—clearly mandated by Congress and signed into law by the President— should be upheld and enforced.

CONCLUSION

For the foregoing reasons, the ZOA respectfully requests that this Court determine that Section 214(d) does not impermissibly infringe on the President's foreign policy powers under the Constitution, and that Section 214(d), clearly written, duly enacted and signed into law by the President, is constitutional and enforceable.

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